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In the

Supreme Court of the United States

No. 856

J. LELAND BROWN, *et al.*,
Petitioners,

v.

PEARL RIVER VALLEY WATER SUPPLY DISTRICT,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Mississippi

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This is a petition by J. Leland Brown and Mrs. Amie Brown, his wife, for this Court's Writ of Certiorari to review a judgment and opinion of the Supreme Court of Mississippi rendered in this cause on the 7 day of October, 1963, 156 So. 2d 572, and not yet reported in the official State Reports.

JURISDICTION

The original decision of the Supreme Court of Mississippi was rendered, as stated, on October 7, 1963. A Suggestion

of Error (which performs the function of a motion for a rehearing) was overruled, without opinion, on October 28, 1963. On December 30, 1963, Mr. Justice Brennan extended to March 26, 1964, the time for the filing of a Petition for a Writ of Certiorari in this case.

The jurisdiction of this Court to review the questions herein presented is invoked under 28 U.S.C. 1257 (3) for that in the taking of privately owned land for alleged public use petitioners contend that they have been deprived of their property in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

The Pearl River Valley Water Supply District, an agency created by Chapter 197 of the Laws of Mississippi in 1958, filed its application to condemn 34.3 acres of land of petitioners, constituting their homestead.

In the pleadings, and at every available stage of both trial and appeal, petitioners contended that they were being deprived of their property without Due Process of law because:

(1) The Water Supply District was attempting to take private property for private use;

(2) The Water Supply District in its Resolution of Taking, except as to 7.6 acres for a federal road and 6.8 acres alleged to be subject to flood, not only omitted to say, but positively refused to say, what use the property was actually being condemned for, and persisted in such refusal throughout the trial of the cause;

(3) In one and the same Resolution of Taking, which is jurisdictional under Mississippi law, the District attempted to state general uses for multiple tracts of land belonging to different owners, as a blanket proposition, whereas under Section 2751 of the Mississippi Code of 1942 it is mandatorily required that the alleged public use be stated as to each landowner separately;

(4) The Petitioners contended that the enabling Act conferred no authority for the condemnation of dry land for recreational uses, parks, and fish and wildlife preserves;

(5) The District had no authority to condemn Petitioners' land for pollution abatement, and

(6) The proposed condemnation is, therefore, in violation of rights guaranteed the petitioners by the Fourteenth Amendment to the United States Constitution.

The trial court prohibited the taking of 19.9 acres and allowed the taking of 14.4 acres. The Water Supply District appealed. The Petitioners cross appealed as to the 14.4 acres. On appeal, the Supreme Court of Mississippi authorized the taking of all the lands. The State Supreme Court attempted to support its decision on non-federal grounds. So far as can be told from its Opinion, the federal Constitutional questions which the land owners attempted to raise were not decided.

QUESTION PRESENTED

Did the denial of the writ of prohibition and consequent authorization for the condemnation of Petitioners' land

deprive them of Due Process of Law guaranteed by the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISION

ARTICLE XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Chapter 197 of the Laws of Mississippi of 1958, beginning at Section 5956-51 of the Mississippi Code of 1942, created the Pearl River Valley Water Supply District. The paramount purpose was the construction of a dam to impound the waters of the river, so as to make a Reservoir. All pertinent grants of authority to the Water Supply District are collected and set forth in Appendix A.

On April 6, 1962, the Water Supply District adopted a resolution of taking entitled "Resolution declaring the necessity for the condemnation of certain lands of Floyd T. Brown and others". The Resolution attempted to deal with approximately 630.2 acres of land belonging to petitioners and to F. Stanton Brown and Floyd T. Brown, each having

separate, independent title to lands other than those involved in this litigation. The petitioners owned only 44.3 acres, their homestead, which was approximately seven per cent of the total lands described in the Resolution of Taking. Only 34.3 acres were involved in the condemnation now sought to be reviewed. The entire Resolution of Necessity is carried as Appendix B to this Petition.

Petitioners availed themselves of the only remedy provided by Mississippi law. This was a Writ of Prohibition. Section 2782 of the Mississippi Code. A copy of Section 2782 is made Appendix C.

In Paragraph V of their Original Petition for the Writ of Prohibition, Petitioners charged that "the taking of petitioners' land which is proposed to be condemned and taken is not for public use or public necessity and that any taking of said land is not for a public use, purpose or necessity. In fact, on the contrary, the lands are attempted to be taken for a private use under the guise of public use".

Paragraph II of the Petition asserted that the Resolution of Taking "failed to allege in said application any specific use or necessity, public or otherwise, that said property is sought to be condemned". Section 2751 of the Mississippi Code requiring that such use must specifically be stated is made a part of this Petition as Appendix D.

Paragraph IV of the Petition for prohibition charged that taking of petitioners' property in this case "would be in violation of the Constitution of the State of Mississippi,

the Constitution of the United States, and the laws of the State of Mississippi".

Paragraph VI of the Petition charged that the Resolution of Taking "wholly failed to allege any specific use for which the land of your petitioners is sought to be taken, except approximately 7.6 acres described in paragraph VI of the application, said 7.6 acres is alleged to be taken for the relocation of the Natchez Trace for the United States Park Service, and that the attempted taking by Eminent Domain of said 7.6 acres is not necessary to the project, is not for a public use or necessity, and further is beyond the power authorized by the Pearl River Valley Water Supply District Act "in that the Act nowhere authorized the condemnation of lands in fee simple for any purpose".

The District answered (Pages 12-17 of the typewritten Record) in which it specifically denied that the taking would be in violation of the Constitution of the United States, the Constitution of the State of Mississippi and the laws of that State.

In an effort to obtain a specific statement of the public uses for which the District sought the lands, a motion for a Bill of Particulars was filed, asking that the District specifically state the uses the District proposed for the land of petitioners. The trial court overruled this motion, except to require the District "to answer with particularity as to the exact uses that Tract F of the petitioners' land is sought to be condemned and further that said answers as to particular uses be not in vague or general terms, but

state with exactness the actual type of facility, building, or other such purpose that petitioners' lands will be used" (Page 30, typewritten Record).

The Board of Directors of the Water Supply District, the statutory body with power to respond, took no action in respect to the order of the Court, but its Attorneys filed a statement which reiterated, in general, the omnibus statements of the Resolution of Taking.

The case went to trial before the Circuit Judge. At the beginning of the trial, Petitioners moved the Court to strike this response by the attorneys for the District as to uses proposed on the ground that it was not the act and deed of the Board of Commissioners of the Reservoir, was identically like the original Resolution of Taking, stated in other words and in other terms but of identical meaning, with the result that the petitioners had not yet, in fact, been furnished with a declaration of the public uses to which the land was to be devoted, if condemned. The Court overruled this motion (R. 69).

At the completion of the hearing, the Circuit Court made the writ of prohibition permanent as to 19.9 acres because "there is no public necessity" for the taking of said lands (typewritten Record, 37). The Reservoir was permitted to take 7.6 acres for the relocation of the Natchez Trace Parkway, a federal road, and 6.8 acres which were alleged to be subject to flooding by the Reservoir.

The Reservoir appealed from the denial of 19.9 acres and the land owners cross appealed as to the 14.4 acres permitted to be taken.

The Supreme Court of Mississippi, without ruling on the Federal Constitutional points raised by the landowners, reversed the writ of prohibition as to the 19.9 acres and affirmed the lower court as to the 14.4 acres. The Opinion appears as Appendix E. It will be noted that while the trial court (R. 37) found there was no public use shown for the 19.9 acres, the Supreme Court went so far as to say there was no basis in law or in fact for the writ of prohibition.

Under Mississippi law, the Resolution of Taking is jurisdictional. Section 2751, Mississippi Code of 1942; *Ferguson v. Seward, et al.*, 146 Miss. 613, 111 So. 596. It may not be made retroactive, *ibid.* Once the Resolution is adopted and condemnation begun the Resolution cannot be amended, *City of Jackson v. Craft,* Miss. , 36 So. 2d 149.

Despite this, on the trial, the consulting engineer for the Water Supply District was allowed to testify that in his opinion the lands of these Petitioners would be needed for (1) boat landing facilities, (2) picnic facilities, (3) restaurant facilities, (4) automotive, gasoline and servicing facilities, (5) parking facilities, (6) motel facilities (R. 76).

It must be noted that any decision as to use rested only with the Board of Directors of the District. Yet, this testimony was very revealing as to the *real uses* for which the land was sought, since the consulting engineer stated that he had attended every meeting of the Board of Directors, except one, since his employment in that capacity, which began about sixty days before the Resolution of Taking.

Perhaps even more significantly, the consulting engineer stated that at the time of the trial, eight months after the Resolution of Taking, *no specific use for any of the property anywhere in the Reservoir area had been decided* (R. 117). At the time of the Resolution of Taking, there had been no shore line study by the consulting engineer as to the uses of dry land adjacent to the Reservoir. None had been completed, submitted or approved at the time of the hearing on the writ of prohibition (R. 128). The consulting engineer thought that the shore line study would not be completed for another six or eight months (R. 131). He admitted that a prior shore line study, undertaken but never completed by other engineers, had recommended the construction of a Motel and Restaurant at the site of Petitioners' home and that right across the State Highway a resort hotel was to be constructed (R. 137).

At a later point in the hearing, the consulting engineer attempted to attach public use to the taking by saying that he would recommend that fifteen acres of the Brown land be used for public meeting facilities with a pavilion and a *certain* number of rental cottages and parking areas.

The Chairman of the Board of Directors testified that the District had already acquired 43,000 acres of land. 30,000 acres would be constantly under the waters of the Reservoir. 5,000 acres would be subject to flood at intervals. 8,500 acres would be above the water at all times. They planned to acquire 3,000 additional acres, of which the Brown land is a part (R. 567).

Dr. A. L. Gray, State Health Officer, a Member ex-officio of the Board of Directors of the Water Supply District, testified in an attempt to justify the taking of Petitioners' land to prevent pollution of the Reservoir. He insisted that neither he nor the other Directors were willing to use the power contained in Section 14 of the Act which reads as follows:

> "14(a) The Board of Directors of the District shall have the power to adopt and promulgate all reasonable regulations to secure, maintain and preserve the sanitary condition of all water in and to flow into any reservoir owned by the District, to prevent waste of water or the unauthorized use thereof, and to regulate residence, hunting, fishing, boating, and camping, and all recreational and business privileges, along or around any such reservoir or any body of land, or easement owned by the District.
>
> "(b) Such District may prescribe reasonable penalties for the breach of any regulation of the District."

It was his position that absolute ownership of surrounding land was necessary to prevent pollution. He further testified that the District had no plans for a sewage control system on the Brown lands (R. 665), that the City of Jackson now has a safe unpolluted water supply, drawn directly from Pearl River, with no buffer zones on each side of the River, and that the District had no plans for the control of the pollution that would necessarily float down the River itself into the Reservoir. Dr. Gray testified that the Water Supply District had already changed the channels of two creeks so as to make them enter Pearl River below the dam and directly into the Jackson water

supply, and this despite the fact that these streams flowed through heavily populated areas and contained raw sewage. (R. 687).

In spite of these statements by Dr. Gray, and, in effect, ignoring the existence of Section 14 of the Act, the Supreme Court of Mississippi held that it was necessary to condemn the land itself to prevent pollution.

ARGUMENT

POINT 1

The Resolution of Taking violated Due Process because it failed to state the use intended for the lands of the Petitioners.

The facts on this point have been recited in the Statement of the Case. Briefly re-stated, the Water Supply District (in its Resolution of Taking) attempted to list a long series of proposed uses, many of which were, we think, private ones, but no specific use was named as to the lands of these Petitioners. On motion for bill of particulars, the District refused to respond.

Of course, the first requirement under Section 17 of the Mississippi Constitution was that the use must be public, and whether public or private is a judicial question regardless of any declaration by the Legislature. It necessarily follows that the Resolution of Taking had to state a valid public use for these particular lands. On the trial of the writ of prohibition the evidence had to support such a public use. Section 2751 of the Mississippi Code of 1942

prescribes the rules of due process. It declares that the condemning authority must "state with certainty the right" for the taking. To be constitutional, it must state the public use for which the lands are needed. *Wise v. Yazoo City*, 96 Miss. 507; 51 So. 453.

When the District refused to name the use it ran directly afoul of the decision of the Supreme Court of the United States in *City of Cincinnati v. Vester*, 281 U.S. 439, 74 L. Ed. 605, 50 S. Ct. 360. In that case, the law of Ohio required a municipality to pass a resolution "defining the purpose of the appropriation". The City failed to do this. The appropriation was unanimously held unconstitutional. The Supreme Court said:

> "To define is to limit, and that which is left unlimited, and is to be determined only by such future action as the city may hereafter decide upon, is not defined. * * * It is not enough that property may be devoted hereafter to a public use for which there could have been an appropriate condemnation. * * * in the absence of such a definition the appropriation must fail by reason of noncompliance with statutory authority".

Except as to the 7.4 acres for the Natchez Trace and 7 acres claimed to be subject to flood, the undisputed proof in the Court below showed that the District had never decided the specific use for the lands of the Petitioner or for any other lands lying above the 300 foot above sea level contour, that is, above flooding. The 19.9 acres of land on which the trial court granted the writ of prohibition were all outside the Natchez Trace and above 300.

We feel it in order to repeat that under Mississippi law the Resolution of Taking is jurisdictional, cannot be made retroactive, and may not be amended once the application for condemnation is filed (Cases cited at Page 8 of this Petition).

Even if one did not know of the precedents herein cited, it would seem inescapable, as a matter of due process, that before one could have an opportunity to defend his lands from an unauthorized taking he would certainly have to be informed of the use intended.

Moreover, if one is not advised "with certainty" as provided by Mississippi Law, and if the District then decides to use the lands for a non-public purpose, the Landowners would be deprived of the right of ouster.

POINT 2

The Resolution of Taking violated Due Process because it included ten tracts of land belonging to four different owners, all in the same Resolution, and in violation of Section 2751 of the Mississippi Code of 1942.

As shown in the appendix, the Pearl River Valley Water Supply District Act required the District in condemnation cases to comply with the procedure "provided by law for the condemnation of lands or other property taken for rights of way or other purposes by railroads, telephone or telegraph companies". This, of course, is Section 2751 of the Code, Appendix D. Specifically, the application shall describe the property sought to be condemned, showing that

of each defendant separately. In the instant case, the Water Supply District attempted to include ten separate tracts of land, variously belonging to four different owners. True, the lands belonging to each defendant was listed separately in an exhibit, but the uses were not listed as to each tract. A casual examination of the attempted Resolution of Taking shows that it was a "shotgun" recitation, a Mother Hubbard statement. For one glaring example, the Resolution listed (as one use) the fact that the lands would be flooded by the Reservoir, whereas, the 19.9 acres left to the Petitioners by the trial court were admittedly above all possibility of flood.

In so serious a matter as taking property from one which is guaranteed to him by both the federal and state Constitutions, a reasonable regard for the Constitutional rights of a citizen, a fairly diligent compliance with the rules of good pleading, would have resulted in a Resolution as to these Petitioners alone. It would have described their lands, and stated the use for which it was claimed they were needed. We concede that if the lands were reasonably identical, and so stated, and the uses were not obviously contradictory, this would not be a material point.

The blanket uses recited in the Resolution contained many which we contend were for private purposes per se, and a Resolution which attempts to commingle uses in this fashion is void. If there is a combined purpose, partly for public and partly for private use or benefit, and the two uses cannot be separated, eminent domain cannot be exercised. 53 A.L.R. at Page 29, and many cases there cited.

POINT 3

The Resolution of Taking violated Due Process because the Act authorizing the Water Supply District did not permit acquiring land by eminent domain for recreational uses, parks, or fish and wildlife preserves.

Mississippi law on the power to condemn was clearly stated in *Wise v. Yazoo City*, 96 Miss. 507; 51 So. 453. There it was stated, "When it is asserted by any person or corporation, the state's assent must be clearly given in legislative acts, and the subjects for which it may be exercised specifically named. No state has yet given to any corporation the sweeping power to condemn and take private property for "any public purpose", without preceding every such clause with specifically named subjects for which it may exercise the right".

The rule is equally well settled in Mississippi that in the exercise of eminent domain the statutes conferring the power must be strictly construed in favor of the landowner and against the condemnor. *Gale v. City of Jackson*, 238 Miss. 826; 120 So. 2d 551, and the five cases there cited.

We all note from Section 13 of the Act, recited in the Appendix, the Legislature was careful to amend the Act so as to expressly provide that the Water Supply District could acquire lands for public parks and recreation facilities and for the preservation of fish and wildlife *other than by condemnation* except as provided in Section 11 (f). Section 11 (f) authorized condemnation where lands were necessary for the project and the exercise of the powers, rights,

and privileges and functions conferred upon the District by the Act. In Section 2(a) of the Act we find the purpose of the Act to be that *the waters may be impounded for recreational uses.* Not a word was said about any purpose to acquire land above the water level for recreational purposes. The impounded, stored, and controlled water was to be *used* for recreational purposes.

Obviously, if the Legislature had purposed that the District could condemn for recreational purposes, for parks, or for fish and wildlife preserves, it would not deliberately have inserted a clause prohibiting eminent domain. Certainly, the District could condemn land for the construction of the Reservoir under Section 11 (f) and the waters so stored and controlled could be used for recreational purposes, or for the preservation of fish, but when the Legislature began providing for the acquisition of *lands* for these purposes it prohibited eminent domain.

POINT 4

The Resolution of Taking violated Due Process because the District had no authority to condemn Petitioners' land for pollution abatement.

Everything stated in the previous point is applicable here, with this added factor. By Section 2(a) in the definition of purposes, the Act stated that the waters of the Pearl River might be preserved, conserved, stored, and controlled for pollution abatement.

Again, in Section 11 (d) in the enumeration of specific powers, the District was empowered to "control, store and

preserve within the boundaries of the project area the waters of the Pearl River or any of its tributaries for irrigation of lands and for prevention of water pollution".

Thus, we are twice cited to the intention that the waters shall be controlled to prevent pollution. Nothing was said about condemning dry land completely around the reservoir for this purpose. To the contrary, in Section 14, the District was expressly given the power to regulate (zone) the land around the Reservoir to preserve the sanitary condition of the water, which, of course, is the way it is usually done throughout the Nation.

But even if the power resided in the District, the undisputed testimony of Dr. Gray, already recited, shows conclusively that, in fact, there was no necessity to acquire the lands of the Petitioners for the prevention of pollution. Indeed, his testimony showed to the contrary, and a taking for this alleged purpose is only a pretext instead of a *real use*. It is an abuse of discretion and thus, within itself, a violation of due process.

POINT 5

The proposed condemnation was, in fact, an attempted taking of private property for private use.

The Resolution of Taking recited that the lands were needed for restaurant facilities and motel facilities.

The Consulting Engineer, upon whose recommendations the Resolution of Taking was adopted, said the lands were needed for restaurant facilities, gasoline service station facilities, motel facilities, and guest house facilities.

At no point did the Resolution state nor did the Water Supply District Officers testify that the above named facilities would be operated by the District as an agency of the State of Mississippi. On the other hand, Section 11 (f) (3) and (g) of the Act provide that, subject to certain privileges accorded former owners, the District may sell or lease any of its lands to private parties.

The Resolution did name other uses which would appear to be public, but *under the omnibus statement of uses* the option would remain with the District after condemnation immediately to lease or sell these lands for restaurant or motels to private operators.

The State Supreme Court stated in its opinion that it was a matter of common knowledge that the public needed places to eat and sleep at such Reservoirs. Armed with this common knowledge, the Legislature wholly refrained from authorizing the condemnation of lands for the construction of hotels, motels, restaurants, gasoline filling stations, or guest houses. The State Supreme Court reads this into the Act by implication, but Mississippi law is that the right of eminent domain cannot be assumed except upon clear grant. *Wise v. Yazoo City, supra.*

Condemnation for private use is a denial of due process of law. *Fallbrook Irrig. Dist. v. Bradley*, 164 U.S. 112, 41 L. Ed 369, 17 S. Ct. 56; *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 49 L. Ed. 462, 25 S. Ct. 251; *Capital Electric Power Ass'n v. McGuffee*, 226 Miss. 227, 83 So. 2d 837.

Whether the use is public or private is a judicial question. *Hairston v. Danville & W. R. Co.*, 208 U.S. 598, 52 L. Ed. 637, 28 S. Ct. 331.

No less an authority than Nichols (Eminent Domain, 2 Ed., Section 7.21) asserts that one would search in vain for the case of an innkeeper permitted to acquire a suitable site for his building without the consent of the owner of the land, and that it seems very doubtful if any court would uphold a statute authorizing such a taking.

Counsel for Petitioners after the most diligent search are unable to find any case from any American Jurisdiction wherein any person or public agency ever sought to condemn private property for a hotel, motel, or restaurant. Such cases could exist, of course, but, like Nichols, we have been unable to find them.

This would seem to establish that the custom and usage of this Country from the beginning has been that restaurants, hotels, motels, and gasoline service stations are not uses sufficiently public in nature to support eminent domain.

The Supreme Court of Mississippi in its opinion in the instant case conceded that a condemnation for restaurants would be for private purpose, if that were the paramount purpose of the taking. The Court then said this:

> "The primary and paramount purpose and use is not for a restaurant or other incidental facility. As far as appellees' land is concerned there are three primary

public uses: Control of pollution, control of access to the reservoir, and to provide recreation".

The opinion then proceeds on the premise that motels, restaurants, etc. are simply incidental to these three "primary" uses.

If the District needed the lands for the construction of a sewage control facility that would be incidental to pollution control. The undisputed testimony shows there is no plan of that kind. A hotel or motel or restaurant has nothing to do with pollution control.

If the lands were needed for a highway or a fence that would be incidental to access. The Water Supply District Act, Section 11, requires that State Highway 43 running all the way across the Reservoir at this northernmost point is to be kept open. The lands involved here are on the opposite side of this State Highway from the Reservoir proper, the north side at this point being subject to backwater only at flood time. So we contend there is really no question of access or control of access as to these lands.

As to recreation, we have already shown, we believe, that the Act specifically prohibits the use of eminent domain for the acquisition of land solely for recreational purposes. Moreover, by the express terms of the Act the water in the reservoir was to be *used* for recreation and the statute is wholly silent as to dry land for recreational purposes other than acquisition by voluntary means.

POINT 6

The Resolution of Taking of 7.6 acres for the Natchez Trace Parkway violated the Fourteenth Amendment in that it seeks to take a larger estate than authorized by statute.

The Resolution of Taking seeks to condemn land *in fee* for the Natchez Trace Parkway. Section 11 (g) of the Act authorizes the District to acquire *easements* or *rights of way* for the relocation of roads, highways, and public utilities. Therefore, the District was simply without the power to condemn *in fee*.

The provisions of Section 11 (g) enunciated existing Mississippi law, as announced in *Dantzler v. Mississippi State Highway Commission*, 187 Miss. 721, 199 So. 367. It was there held, "a condemnor of a right of way for a public road does not take the entire fee in the land".

Again, a taking *not authorized by law* is a violation of the Fourteenth Amendment.

POINT 7

(The 6.8 acres alleged to be *subject to flood.*)

A survey during the course of the litigation established this parcel at 7 acres. Petitioners contended, as a matter of fact, that this land was not subject to flooding. We remain of that belief. This, however, is a question of fact. The trial court found, in its judgment, that it is subject to flood. We do not here ask for a review of any findings of fact.

We reiterate, however, that the Resolution of Taking and eminent domain as to this particular piece of land *was void* for the reasons set out in Points 1, 2, and 8 of this Petition.

POINT 8

The Act providing for the creation of the Pearl River Water Supply District is unconstitutional on its face.

The Pearl River Valley Water Supply District was created under the authority of Chapter 197 of the Laws of Mississippi of 1958.

Section 11 (f) (3) authorizes the Water Supply District to rent, lease, or sell lands to any person, firm, or corporation for the purpose of operating recreational facilities for profit. This power was limited only by the requirement that the Board of Directors should specify the terms and conditions of such sale, rental, or lease, and shall advertise for public bids thereon, and the former owner should have the exclusive right at his option for a period of thirty days to rent, lease, or purchase by meeting the terms of the highest and best bid and provided further that no former owner should be allowed to rent, lease, or buy any more land than was taken from him.

Obviously, the provisions as to allowing the former owner an opportunity to meet the highest bid was an effort to get around the unconstitutionality of taking private land by eminent domain and then selling or leasing the same to private parties.

This, however, would not cure unconstitutionality. It did not allow the former owner to have his land back at the

price which he received when it was taken from him; it allowed the District to sell his land to private individuals *at a profit to the District.*

Section 11 (v) of the Act authorized the District from time to time to lease, sell, or otherwise dispose of lands "when in the opinion of the Board of Directors it shall not be necessary to the carrying on of the business of the District that the District own such lands". There is no requirement that the lands be first used for public purposes and if the use later fails then the lands may be sold.

Section 11 (w) provides that these lands may be sold to the highest bidder, but the former owner may purchase if he meets the highest bid within thirty days. Again, he is not allowed to repurchase at the price he received for the land when it was condemned, but must pay the District a financial profit on the lands.

This is exactly the same plan, as we see it, that was emphatically condemned as unconstitutional by the Supreme Judicial Court of Massachusetts in *Salisbury Land and Improvement Company v. Commonwealth*, 215 Mass. 371, 102 N.E. 619, 46 L.A.R. (N.S.) 1196. In that decision, the Court held a statute to be unconstitutional beyond a reasonable doubt when it authorized the acquisition of land under the power of eminent domain for a private purpose and to be paid for by taxation.

The Court said that the absolute and unqualified power to sell and lease to private owners negated the constitutionality of the proposal.

The Court used the following language which we believe is universally accepted and followed throughout these United States:

> "The taking of land of one person, either through taxation or eminent domain, for the purpose of giving it to another, is not for a public purpose, and it is contrary to the basic and essential principles of free government".
>
> "Private property cannot be taken ostensibly for a public use and then diverted to a private use, and the legislation so designed or framed as to permit this result is invalid".

This is the law in Mississippi as declared by our own Supreme Court. *Capital Electric Power Association v. McGuffee*, 226 Miss. 227, 83 So. 2d 837.

The Water Supply District has the power, under the Act, not only to retain two mills of all state taxes collected in five counties, but has the power to levy two additional mills ad valorem tax on all property within the five counties, which it is doing.

Petitioners were prevented from raising the per se constitutionality of the Act in the Circuit Court or in the State Supreme Court because the Supreme Court of Mississippi in *Culley v. Pearl River Industrial Commission*, 234 Miss. 783, 108 So. 2d 390, had already upheld its constitutionality, five years ago. The point is that the Petitioners and no other land owners were allowed to be parties to the *Culley* case. Indeed, in the proceedings to validate the creation of the District, the Act expressly provided in Section 5 (d) "It shall not be necessary that any land owners in the counties

to be included in said proposed district be named in the petition, or made parties defendant".

Therefore, when Petitioners here came to the protection of their own lands they were confronted with a decision of the Mississippi State Supreme Court to which they were not parties, and in which the statute directed their exclusion. As expected, in our present case, the State Supreme Court held that *Culley* was stare decisis. We submit that this procedure is unconstitutional on its face as denying Due Process.

Therefore, present Petitioners are forced to raise the constitutionality of the statute for the first time on this appeal to the Supreme Court of the United States.

As the record in the instant case shows, Petitioners tried to challenge the constitutionality of the taking of their lands by a proceeding in the United States District Court, but this was dismissed as prematurely raised. *Floyd T. Brown and J. Leland Brown v. Pearl River Valley Water Supply District*, No. 18,626, 5th U. S. Circuit Court of Appeals.

ESTABLISHING NEED FOR PUBLIC USE BY STARE DECISIS

The constitutionality of the creation of the Water Supply District was upheld by the State Supreme Court in *Culley v. Pearl River Industrial Commission*, 234 Miss. 783, 108 So. 2d 390, decided five years ago. In that case the Court said the issue is whether the authorizing act is void on its face. The constitutionality of the Act was upheld. Then, the

Court further proceeded to say "We adjudicate here that the one-quarter mile perimeter area, if taken by eminent domain, will be for a public use. The undisputed evidence so shows". This was at a time when no particular land was sought to be taken and when the issue as to need for public use had not been tried in the court below and was not an issue by any landowner on appeal. The Petitioners were not a party to the *Culley* case, and, indeed, the statute provided that no landowner should be made a party, only certain public officials being so required.

In the case now sought to be reviewed the State Supreme Court said that *Culley* was not res adjudicata as to the need for the lands of Petitioners, nevertheless, it was *stare decisis* as to public use.

The statement in *Culley*, above referred to, was not necessary to the decision of the case; was *obiter dicta*, and does not support *stare decisis*.

Maybe the taking of land by *stare decisis* squares with due process, but we respectfully submit that it does not.

We here reiterate that nowhere in the Act is the power of eminent domain granted to seize land at any point (or all the way around the Reservoir) so as to keep anyone from approaching it except at the will of the District. Had the Legislature so intended it very easily could have said so in the Act.

CONCLUSION

With great deference to the Opinion of the Supreme Court of Mississippi, we respectfully submit that the Record in

this case is replete, at many points and in many ways, with denials of due process of law to the Petitioners, as guaranteed to them by the Fourteenth Amendment to the United States Constitution; that the case presents such substantial questions of constitutional rights as ought to be reviewed by the Supreme Court of the United States.

Respectfully submitted,

JAMES P. COLEMAN,
Attorney at Law,
Ackerman, Mississippi,
Attorney for the Petitioners,

W. D. COLEMAN,
Ackerman, Mississippi,

LEE, MOORE AND COUNTISS,
Petroleum Building,
Jackson, Mississippi,
Of Counsel.

CERTIFICATE

I, James P. Coleman, the Attorney for the Petitioners herein, and a Member of the Bar of the Supreme Court of the United States, do hereby certify that on the day of , 1964, I served five printed copies of the foregoing Petition for a Writ of Certiorari on the Honorable H. V. Watkins, Attorney at Law, Deposit Guaranty Bank Building, Jackson, Mississippi, Attorney for the Pearl River Valley Water Supply District, by mail, in a duly addressed envelope, postage prepaid.

JAMES P. COLEMAN
Attorney for J. Leland Brown and Mrs. Amie Brown, Petitioners.

APPENDIX

The Opinion of the Supreme Court of Mississippi on which the Writ of Certiorari is Sought.

PEARL RIVER VALLEY WATER SUPPLY DISTRICT

v.

J. LELAND BROWN *et al.*

No. 42886

Supreme Court of Mississippi, Oct. 7, 1963.

Landowners brought prohibition proceeding against the Pearl River Valley Water Supply District which had brought suit to condemn 34.3 acres of land for pollution control, control of access, public park, facilities for launching boats, picnic areas, restaurants, motels, and wildlife sanctuary. The Circuit Court, Hinds County, Leon F. Hendrick, Jr., entered judgment making prohibition final as to 19.3 acres, and the District appealed, and the landowners cross-appealed. The Supreme Court, Gillespie, J., held that land condemned was for public use; that evidence established that there was public necessity for taking, and that Circuit Court erred as matter of law in requiring District to show public necessity "clearly and without doubt".

Reversed and rendered on direct appeal and affirmed on cross appeal.

1. Eminent Domain

Burden of proving that land is to be condemned for public use is on condemnor. Const. 1890, § 17.

2. Courts

Eminent Domain

Judgment that act authorizing condemnation by Pearl River Valley Water Supply District was constitutional in so far as act authorized public uses in quarter-mile perimeter area was not res judicata in subsequent condemnation proceeding but was stare decisis where land sought by District was to fulfill District's public purposes. Laws 1958, c. 197; Const. 1890, § 17.

3. Eminent Domain

Land condemned by Pearl River Valley Water Supply District was for "public use" where land was for pollution control, control of access, public park, facilities for launching boats, picnic areas, restaurants, motels, and wildlife sanctuary. Laws 1958, c. 197; Const. 1890, § 17.

See publication Words and Phrases for other judicial constructions and definitions.

4. Eminent Domain

If primary purpose of taking is private, taking is unlawful, but if primary and paramount purpose of taking is for public use, it will not be defeated because some incidental private benefit or use results. Const. 1890, § 17.

5. Eminent Domain

Question whether there is public necessity for taking is essentially legislative. Const. 1890, § 17.

6. Eminent Domain

Burden of proof on issue of public necessity for taking is on landowner who claims lack of necessity. Const. 1890, § 17.

7. Eminent Domain

Determination of question whether there is public necessity for taking is within discretion of condemnor, and court will interfere with exercise of discretion only when abuse of discretion or fraud is shown. Const. 1890, § 17.

8. Eminent Domain

Evidence established that there was public necessity for taking of land by Pearl River Valley Water Supply District for pollution control, control of access, public park, facilities for launching boats, picnic areas, restaurants, motel, and wildlife sanctuary. Laws 1958, c. 197; Const. 1890, § 17.

9. Eminent Domain

Trial court erred as matter of law in requiring condemnor to show public necessity "clearly and without doubt". Laws 1958, c. 197; Const. 1890, § 17.

10. Eminent Domain

Resolution for taking of land by Pearl River Valley Water Supply District for control of pollution, control of access to reservoir, and recreation was sufficient, though it did not show specifically what each part of land was to be used for. Laws 1958, c. 197; Const. 1890, § 17.

Robert H. Weaver, Watkins, Pyle, Edwards & Ludlam, Jackson, for appellant.

Lee, Moore & Countiss, Jackson, J. P. Coleman, W. D. Coleman, Ackerman, for appellees.

GILLESPIE, Justice.

The appellant, Pearl River Valley Water Supply District (herein sometimes called District), filed suit to condemn 34.3 acres of land located in Madison County. The land was sought by the District for the purposes hereinafter mentioned in connection with the construction and development of a reservoir and related facilities in accordance with the authority granted the District by Chapter 197, Miss. Laws 1958. The owner of said lands, J. Leland Brown, and his wife, Mrs. Amie Brown, were made defendants in the condemnation suit.

In due time and before the condemnation suit was tried, appellees filed in Circuit Court a petition for a writ of prohibition. In this petition reference was made to the condemnation suit which was then pending in the special court of eminent domain in Madison County. The petition and the answer thereto raised the issues hereinafter stated and discussed. The petition sought and the court granted a temporary writ of prohibition pending final hearing.

Upon conclusion of the hearing on the merits, the Circuit Court found that 7.6 acres of appellees' land would be turned over by the District to the Natchez Trace Parkway for the relocation of the parkway; 2.10 acres was below contour 296 above sea level and would be permanently inundated;

5.4 acres was between contour 296 and contour 300 and would be subject to occasional inundation; and the remaining 19.3 acres was above contour 300 above sea level. All of said land is within one-quarter mile of contour 300 feet above sea level. The Court dissolved the temporary writ of injunction as to all of said lands to be used for relocation of the Natchez Trace and that below contour 300 above sea level, and made the writ permanent as to the remaining 19.3 acres. The District appealed directly from that part of the judgment of the Circuit Court making the writ of prohibition final as to 19.3 acres. J. Leland Brown and his wife cross-appealed from that part of the judgment vacating the temporary writ of prohibition and declining to make final said writ as to said lands in excess of 19.3 acres.

In his opinion the Circuit Judge referred to the provisions of the Act creating the District providing that a person actually living on the land shall have certain rights of repurchase and stated that "* * * due to the fact that the provision is in the statute, it is my opinion that public necessity should be clearly and without doubt shown before a person's homestead may be taken." The Circuit Judge then concluded that there was no public necessity for the taking of the 19.3 acres.

The minutes of the Board of Directors of the District declaring the necessity for the condemnation of appellees' land was made Exhibit B to the application in the eminent domain suit and was set forth in the answer to the petition for a writ of prohibition, being as follows:

"WHEREAS, this Board does now find and determine that most of the lands more particularly described in Exhibit

'A', attached hereto and made a part hereof, is located below the 300 foot above sea level contour and will be inundated, either permanently or periodically; that the remainder of said described lands are located within one-quarter (¼) mile from the outside line of the 300 foot above sea level contour on each side of Pearl River; that all of said lands are necessary for the construction, operation and maintenance of said Reservoir, for the recreational development of the shoreline, to provide access to the Reservoir and its shoreline, for the control of the Reservoir and the protection of its waters from pollution, and such other uses as are authorized by law, as specified in the said Resolution of this Board captioned 'General Policies of Land Acquisition'; that the only interchange connecting the Natchez Trace Parkway with the Pearl River Reservoir is located immediately adjacent and contiguous to said lands; that part of said lands are required for the relocation of the Natchez Trace Parkway itself; that many persons will come from the Natchez Trace Parkway and will need public access and public accommodations here; that in addition to Natchez Trace Parkway traffic, Highway 43 serves a tremendous and populated area requiring public access and public accommodations; that a public park and public facilities such as boat launching facilities, picnic facilities, restaurant facilities and motel facilities will be required on said land; that a portion of these lands are needed for a wildlife sanctuary to be prepared by the District; * * *."

The entire land involved in this controversy consisting of 34.3 acres has been occupied by appellee and his family for ten years, but title was not acquired by appellee until 1960. It is located in the north and east of the intersection of Mississippi State Highway 43 and the Natchez Trace Parkway. The said intersection is located on the west side of the proposed 30,000 acre reservoir. This intersection is about ten miles north of the west end of the dam which is located near a Natchez Trace Parkway interchange by means of which traffic can leave the Natchez Trace Parkway and go to the dam. There is to be no other interchange going north on the Natchez Trace Parkway between the Dam and the interchange at Highway 43. There will be an additional interchange about eight miles north of the Highway 43 interchange. Between the interchange near the dam and the interchange at the intersection with Highway 43, there will be three underpasses where local traffic can go under the Natchez Trace Parkway to reach certain areas of shore property lying between the Natchez Trace Parkway and the reservoir. For most of the distance the Natchez Trace Parkway, between the interchange at the dam and the interchange at Highway 43, runs close to the water line and there is no land between contour 300 and the Natchez Trace exceeding about ten feet in width. So for practical purposes, the western boundary of a large part of said ten-mile strip will be the Natchez Trace Parkway.

After the reservoir is filled there will be only 161 acres of land in the area of the intersection of the Natchez Trace Parkway and Highway 43 above contour 300. Ninety-seven

acres of this land has already been acquired by the District and the remaining part is involved in this and other litigation.

The engineer for the District, the president of the District Board, and the State Health Officer, who is also a member of the District Board, all testified. Extensive inquiries were made concerning the public needs of other reservoirs similar to the proposed Pearl River Reservoir, and the witnesses visited and studied thirteen other such projects. Based on these studies, including the actual statistical data from the experiences of other reservoirs, it was estimated that when the District completes and fills the reservoir it will be visited by approximately 2,630,000 people annually, with a daily average of 7,200, and in peak days, 46,000. The public will require 67 ramps for launching boats, 41 picnic areas, 10 swimming beaches, 414 tent spaces, 104 guest rental units, 5 restaurants, and 6 organizational camps. It was estimated by the witnesses that 22½% of the visitors to the entire reservoir will use the area at the intersection of Highway 43 and the Natchez Trace Parkway, and the same percentage of the said facilities will be needed by the public in that area, that is, on the 161 acres of land between contour 300 and the Natchez Trace Parkway, and the same percentage of pellee, J. Leland Brown. The number of visitors will nearly triple in ten years after completion of the reservoir. Said witnesses testified that the acquisition by the District of the land in question was imperative in order to control access to the reservoir and to control pollution, and that if the District did not own and control this piece of land it would frustrate

the whole project, and they were of the opinion that the entire 161 available acres in the intersection area was insufficient for the needs of the District.

All of said witnesses were of the opinion that the District needed a minimum of 660 feet above contour 300 above sea level around the entire perimeter of the reservoir in order to adequately control pollution and access to the reservoir. It was shown by these witnesses that facilities such as swimming beaches, community houses, rental units for overnight visitors, gasoline stations, restaurants, boat launching facilities, parking areas, and like facilities are customarily provided at public reservoirs. These witnesses also stated that the City of Jackson is now paying $500,000 annually to the District for water and that the continuance of this payment depended on the District furnishing the City of Jackson a supply of pure water. They were of the opinion that pollution control could not be accomplished by exercise of the zoning powers, but that it was imperative to own the land so that any lease made thereof could provide for control. Because so many people would use the Natchez Trace-Highway 43 area, it would be necessary to control the collection and disposal of all wastes so as not to pollute the water.

The plans are not final as to the exact use to be made of each part of appellees' land, except that it will all be needed for pollution control and for access control. All of said witnesses testified that it would be needed for various park and recreational purposes including those mentioned.

The engineer and president testified that final plans for use of appellees' land could not be made until the District determined what land would be available to the District.

A former engineer for the District testified for appellees and he thought pollution control for this large reservoir was ridiculous, but he admitted that the Natchez Trace-Highway 43 area was a "hot spot" and it was needed by the District for recreational purposes. He thought appellees should be allowed to keep their land because of the homestead provisions of the law, and while he was engineer for the District he gerrymandered the boundaries in order to let the Browns keep their land.

A member of the Board of the District testified for appellees and stated that until overall plans for the reservoir are completed it cannot be said that any particular piece of land is necessary.

A former member of the Board of the District testified for appellees and said that he did not consider the taking of appellees' land necessary, but that it was desirable. He stated that he realized "the need to control the shoreline, just how far from the shoreline has never been clear in my mind, why the Board wanted to acquire so much of that property beyond the water's edge."

This Court passed on the constitutionality of the Act authorizing the creation of the District in Culley v. Pearl River Industrial Commission, 234 Miss. 783, 108 So. 2d 390, and in that opinion sets out the essential provisions of the Act.

I.

The first question presented by this appeal is whether proposed use of the land involved in this suit is a public use.

1. The petition denied and the answer affirmed that the use to be made of appellees' land was a public use. When that issue is made, it must affirmatively appear that the use is public, else the writ of prohibition must issue. The burden of proof is on the condemnor on this issue. Section 17, Constitution of Mississippi, makes the question whether the land taken is for a public use a judicial question. Section 17 follows:

"Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use by public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public."

2. Appellant contends that the question of public use was determined in the Culley case and that appellees are bound by that decision under the doctrine of res judicata. We hold that the Culley case did not bind the individual landowners under the doctrine of res judicata. What that case held, for the purposes of determining the constitutionality of the Act, insofar as the public use question is concerned, was that the uses authorized by the Act of the quarter-mile perimeter area, were public uses, and to that extent

that case is binding as precedent under the doctrine of stare decisis. Since the proof in the present case shows that the land sought to be condemned is for use by appellant in fulfilling its public purposes, this Court is bound by the Culley case on the question of public use. In that case, we held, among other things, that use of land within the quarter-mile perimeter area for pollution control, control of access to the reservoir, for parks and recreation facilities, would be public use of such land. That part of appellees' land to be used for relocating the Natchez Trace and that part which will be below contour 300 feet above sea level involve uses so obviously public that discussion thereof is unnecessary.

3. The resolution adopted by appellant declaring the appellees' land to be necessary for public use stated the purposes to be for control of access and pollution control, as already mentioned. It also stated that part of said lands would be used for facilities for public use, including a public park, facilities for launching boats, picnic areas, restaurants, motels, and wildlife sanctuary. It is contended by appellees that these are private purposes; and to permit the taking of said land would be contrary to Section 17 of the Constitution of Mississippi in that it would be taking private lands for private purposes. They also argue that the leasing of said lands for such purposes would not be for a public purpose. There are two reasons why this argument is not valid.

First, all of the proposed uses are those customarily provided for the public at such recreational reservoirs. The proof so showed without dispute. These facts we also know as a

matter of common knowledge. When people visit a recreational area and stay overnight or for several days or more, obviously they need a cabin or motel room in which to sleep. They need places to launch and protect their boats, to purchase gasoline for boats and automobiles, to park automobiles, to camp, to congregate, to eat, to swim, have picnics, and other facilities for their enjoyment and comfort. These facilities must necessarily be near the water, else the appellant cannot provide the recreation contemplated by the legislature. Therefore, we hold that all of such incidental uses are public uses. If the appellant provides these facilities by leasing a part of the subject lands to private individuals or corporations with appropriate provisions in the lease to assure pollution control and access control, and to assure that the lessee will provide the public facilities, such leasing will not detract from the public use of said lands. This we held in the Culley case, following Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, 115 A.L.R. 1436. The establishment of parks and facilities in furtherance of recreation in connection with the reservoir is a public use. 2 Nichols, Eminent Domain; 3rd Ed. (1950), Sec. 7.5151.

In the second place, the land in question is to be used for pollution control and control of access. That alone justifies the taking insofar as the question of public use is concerned. The "* * * taking is not invalid merely because an incidental benefit will inure to private individuals." 2 Nichols, Eminent Domain, 3rd Ed. (1950), Sec. 7.222. And in the Culley case we said: "The conditional or discretionary power

in a district to later lease or sell the property is only a minor incident to the general public purpose of the Act."

It seems obvious to this Court that if the District is to fulfill the public purposes stated in the Act, it must own the perimeter lands for control of access to the waters of the reservoir, and in order to control pollution, perhaps the most important factor in carrying out the public purposes of the Act.

4. We have carefully considered the numerous cases relied upon by appellees and fail to find them applicable. Peavy Lumber Co. v. Brevard County, 159 Fla. 311, 31 So. 2d 483, 172 A.L.R. 168 (1928), is not in point on the facts. Courtesy Sandwich Shop, Inc. v. Port of New York Authority, 17 A.D. 2d 590, 237 N.Y.S. 2d 820 (1963), is not in point. In that case land was sought to be condemned which was not to be used for any public purpose. But the Court recognized that when land is taken for a public purpose which is primary and paramount, the taking will not be defeated by the fact that incidentally a private use or benefit will result which would not of itself warrant the exercise of the power. Applying that case here, it would follow that if the primary purpose of the proposed taking is private, the taking is unlawful. On the other hand, if the primary and paramount purpose of the taking is for public use, as in the case at bar, it will not be defeated because some incidental private benefit or use results. That is what the New York Court held, and that is the effect of the Culley case. That same rule applies to the present case.

Appellees earnestly and vigorously contend that the taking of their land constitutes a sin against private property and that the use of the power of eminent domain in this case would amount to a liberal application of the power of eminent domain, and cite cases holding that such power must be strictly construed. The appellees take specific uses such as "restaurants" and proceeds to argue that the restaurant business is private and the District has no right to condemn private property for such private use. If a restaurant or other such facility was all that was involved, appellees would be correct. The fallacy of this part of appellees' argument is the isolation of specific matters from the context of the public purposes involved. The primary and paramount purpose and use is not for a restaurant or other incidental facility. As far as appellees' land is concerned there are three primary public uses: Control of pollution, control of access to the reservoir, and to provide recreation. All of these uses pertain to the reservoir, and to contend that these uses are not public is to contend that the reservoir itself is not a public use of the lands covered thereby. There are numerous public parks, buildings, reservoirs, college campuses, schools, courthouses, airports, seaports, and office buildings, the public use and enjoyment of which require more than the primary use. Parking lots, rest rooms, community houses, swimming pools, rental cottages in parks, restaurants facilities, and service stations, are frequently either furnished by a governmental unit or land is leased to private persons or firms to provide the needed incidental facility. We take notice of these facts as matters of common knowledge and current history. These

uses are mere incidents to the primary and paramount public uses, but are nevertheless essential uses in connection with the primary public uses. It could not be seriously argued, for instance, that land could not be condemned for an airport because space would be leased private persons or firms for the operation of a restaurant. There is just as much public reason for a restaurant where people gather to use a reservoir for recreational purposes as there is for a restaurant at an airport.

II.

The second question for our decision is whether there is public necessity for the taking of appellees' land.

[5-7] We have heretofore stated clearly and without equivocation that the question of public use is always a judicial question and that it is made so by Section 17 of our Constitution. Our authorities are equally clear that whether there is a public necessity for a taking is essentially a legislative question. The burden of proof on this issue is on the landowner who seeks to show lack of necessity, and the rule is that as to whether the taking is necessary is within the discretion of the condemnor, and the courts will interfere with the exercise of such discretion only when abuse of discretion or fraud is shown. This rule was stated in the Culley case, which followed Ham v. Board of Levee Commissioners, 83 Miss. 534, 35 So. 943 (1903), and City of Greenwood v. Gwin, 153 Miss. 517, 121 So. 160 (1929). See also Erwin v. Mississippi State Highway Commission, 213 Miss. 885, 58 So. 2d 52 (1952). There is no authority in this State to the contrary.

[8, 9] This record is devoid of any proof or showing of any kind that the appellant abused its discretion in seeking to condemn appellees' land. No fraud, actual or legal, was shown. On the contrary, while the burden of proof on this issue was on the appellees, the appellant showed by overwhelming proof that the land in question is necessary for the public uses mentioned. The trial court erred as a matter of law in requiring the appellant to show public necessity "clearly and without doubt." This is not the test on the question of public necessity, for the burden of proof is not on the appellant in this case, and the test is not whether public necessity was shown clearly and without doubt. This error arose because the Circuit Judge erroneously applied the homestead provisions of the Act as requiring public necessity to be shown clearly and without doubt.

Section 11, Chapter 197, Laws of 1958, provides in part as follows:

"(w) When in the opinion of the Board of Directors as shown by resolution duly passed, it shall not be necessary to the carrying on of the business of the District that the District own any lands acquired, then the Board shall advertise such lands for sale to the highest and best bidder for cash, and shall receive and publicly open the bids thereon. The Board shall, by resolution, determine the highest and best bid submitted for such land, and shall thereupon notify the former owner, his heirs or devises, by registered mail, of the land to be sold and the highest and best bid received therefor, and such former owner, or his heirs or devisees, shall have the exclusive right at his or their option for a

period of thirty (30) days in which to meet such highest and best bid and to purchase said property."

"(x) Any bona fide, resident householder, actually living or maintaining a residence on land taken by the District by condemnation shall have the right to repurchase not exceeding forty (40) acres of his former land or other available land from the Board of Directors for a price not exceeding the price paid for condemning his land."

The provisions of subsection (x) give a householder actually living on the lands the right to repurchase under limited circumstances not exceeding forty acres of his former land or other available land at a price not exceeding that paid for condemning his land. When read with subsection (w), this refers to land determined by the District and shown by resolution as not necessary to the carrying on of the business of the District. The householder is given more advantage than a mere owner as to price, but limits the amount in any event to forty acres. The right to repurchase does not arise until land has been declared surplus by the District. The repurchase provision has no bearing on the right of the District to condemn land.

III.

The third question for decision is whether the resolution of the Board of Directors of appellant is sufficient.

Appellees argue that the resolution declaring the necessity for the taking of appellees' land should have shown specifically what each part of appellees' land is to be used for, and that the failure of the resolution and the proof in

this regard renders the taking unlawful. They argue that unless they are advised the specific uses of every part of their land, it is not possible to determine whether the uses are public or private; and that the failure to show such specific uses makes it impossible for the courts to apply Section 17 of the Constitution in this case.

[10] The resolution is copied in another part of this opinion. It shows the uses to be made of appellees' land but neither the resolution nor the proof showed any final plans indicating specifically what use is to be made of particular parts of appellees' land. We are of the opinion that appellees' argument is not well taken. The proof showed that all of said land would be used for pollution control and control of access to the reservoir. As already stated, that alone is sufficient to meet the requirements of the law on the question of public use. In addition, all the other uses as for parks and recreational facilities are also public uses. It is unreasonable and unnecessary to require the condemnor for such public uses to include in the resolution and show by proof final plans for every part of the land taken. Such a rigid requirement would imply that no change could ever be made in the various public uses as time and circumstances might require. It would also imply that no change in plans or use could ever be made. So long as public use is shown, detailed plans are not required.

We are of the opinion, and so hold, that there exists no legal or factual basis for the issuance of a writ of prohibition in this case. On direct appeal the case is reversed, the writ

of prohibition is dissolved, and judgment is entered here dismissing the petition. The case is affirmed on cross-appeal.

Reversed and rendered on direct appeal; affirmed on cross-appeal.

All Justices concur, except McGEHEE, C. J., who took no part.

JUDGMENT OF THE SUPREME COURT OF MISSISSIPPI

Monday, October 7, 1963.

Pearl River Valley Water Supply District

42,886

v.

J. Leland Brown, et al

This cause having been submitted at a former day of this Term on the record herein from the Circuit Court of Madison County, and this Court having sufficiently examined and considered the same and being of the opinion that there is error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 6th day of May 1963—on direct appeal, the case is reversed, the writ of prohibition dissolved and the petition dismissed; on cross-appeal the cause is affirmed. It is further ordered and adjudged that the appellant do have and recover of and from the appellees all of the costs in this Court and in the Court below to be taxed, for which let proper process issue.

Minute Book "BN" Page 45

SECTION 17, MISSISSIPPI CONSTITUTION

Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public.

APPENDIX A

The Pearl River Valley Water Supply District Act

Chapter 197, Laws of Mississippi of 1958 Mississippi Code of 1942, beginning with Section 5956-51

Synopsis of Act as to Portions of the Act Cited by Petitioner

TITLE OF THE ACT

AN ACT to declare the public necessity of creating a governmental subdivision of the state to be known as the Pearl River Valley Water Supply District; to provide for the creation of such water supply district; to authorize such district to construct, own and operate reservoirs and dams to insure adequate water supply for domestic, municipal, commercial, industrial, agricultural and manufacturing purposes, and recreational uses; to authorize such district to perform, and to assist and cooperate with agencies of the federal government or of the state or any political subdivision thereof in performing, water conservation, flood control, pollution abatement, timber conservation, and irrigation work; to provide for the further powers and duties of such district; to provide for the financing of such district; to authorize such district to issue bonds and to provide for the payment of such bonds.

PURPOSES FOR WHICH THE DISTRICT WAS CREATED

From Section 2 (a) It is further determined and declared that the preservation, conservation, storage and control of

the waters of the Pearl River and its tributaries and its overflow waters for domestic, municipal, commercial, industrial, agricultural and manufacturing purposes, *for recreational uses*, for flood control, timber development, irrigation and pollution abatement are, as a matter of public policy, for the general welfare of the entire people of the state.

(b) That the creation of the Pearl River Valley Water Supply District is determined to be necessary and essential to the accomplishment of the aforesaid purposes. * * * All the terms and provisions of this Act are to be liberally construed to effectuate the purposes herein set forth, this being a remedial Act.

POWERS OF THE DISTRICT

(Stated in Brief Form, Without Copying the Exact, Lengthy Provisions, but Omitting No Essentials).

Section 11 (a) To impound overflow water and surface water of the Pearl River or its tributaries by the construction of a dam or dams, reservoir or reservoirs, works, plants and any other necessary or useful related facilities contemplated and described as a part of the project.

To control, store and preserve such water, and to use, distribute and sell the same (waters).

To construct or otherwise acquire all works, plants, or other facilities necessary or useful for the purpose of processing such water and transporting it to cities and others.

(d) to control, store and preserve within the boundaries of the project area the waters of the Pearl River or any of its tributaries, for irrigation of lands and for prevention of water pollution.

(e) To acquire by purchase, lease, gift or in any other manner (otherwise than by condemnation) and to maintain, use and operate any and all property necessary for the project and convenient to the exercise of the powers, rights, privileges and functions conferred upon the District by this Act.

(g) To require the necessary relocation of roads and highways, and railroad, telephone and telegraph lines and properties, electric power lines, gas pipe lines and mains and facilities, upon due compensation.

(h) To overflow and inundate public lands.

(i) To construct, extend, improve, maintain and reconstruct any and all facilities of any kind necessary or convenient to the project and the exercise of its powers, rights, privileges and functions.

(v) To lease, sell or otherwise dispose of any property of any kind, real, personal, or mixed, with the right of former owners to repurchase not at the price paid them but at a price to equal the highest bid offered at public sale.

SPECIAL AUTHORITY IN A SEPARATE SECTION AS TO PARK AND RECREATION FACILITIES

Section 13. Park and recreation facilities. The Pearl River Valley Water Supply District is authorized to establish

or otherwise provide for public parks and recreation facilities, and for the preservation of fish and wildlife, and to acquire land *otherwise than by condemnation except as provided in Section 11 (f)* for such purposes, within the project area."

NOTE: As the Act was originally introduced and passed the Senate, this section did not contain the language above italicized. The italicized language prohibiting the use of eminent domain was inserted in the Ways and Means Committee of the House of Representatives by its Amendment 14, adopted by the House, and concurred in by the Senate. See Page 982, House Journal, 1958. Petitioners have contended, without success in the State Courts, that under Section 11 (e) and 13 the District had the authority to acquire from voluntary sales land for parks, recreational facilities, and fish and wildlife preserves, *but not by condemnation*. The State Supreme Court in its opinion ignored this contention and altogether refused to pass on it.

POWER OF THE DISTRICT TO ACQUIRE LAND BY EMINENT DOMAIN

The power of the District to condemn land for its use is specified in Section 11 (f) of the Act which reads as follows:

> "To acquire by condemnation any and all property of any kind, real, personal or mixed, or any interest therein within the project area not exceeding one quarter mile from the outside line of the 300 foot above sea level contour on each side of Pearl River, except as provided for rights-of-ways under sub-section (g)

> of this Section, within or without the boundaries of the District necessary for the project and the exercise of the powers, rights, privileges and functions conferred upon the District by this Act according to the procedure provided by law for the condemnation of lands or other property taken for rights of way or other purposes by railroads, telephone or telegraph companies."

It must be noted that the language "not exceeding one quarter mile from the outside line of the 300 foot above sea level contour on each side of the Pearl River" was not in the Act as it was introduced and passed by the State Senate. It was inserted by the House of Representatives as Ways and Means Committee Amendment Number 6. Page 980 of the House Journal. Prior to this Amendment, there was no limitation on area. It necessarily follows that the one quarter mile area is a limitation upon authority, and not a general grant to go to the one quarter mile limit at the unfettered discretion of the Board. We further note the language "necessary to the project", which would have made the entire provision in violation of Section 17 of the Mississippi Constitution had it not been included. It must be further noted that the law of eminent domain to be allowed to such taking is not the general law of the sovereign but only that which is enjoyed by railroads, telephone or telegraph companies.

Without copying in full the detailed provisions of Section (f), we point out that the taking of minerals or royalties within the project area is prohibited.

APPENDIX B

THE RESOLUTION DECLARING THE NECESSITY FOR THE CONDEMNATION OF CERTAIN LANDS OF FLOYD T. BROWN AND OTHERS

WHEREAS, the acquisition of the hereinafter described lands came on for consideration by the Board of Directors of the Pearl River Valley Water Supply District upon the recommendation of the District's consulting engineer and the report of the Board's land acquisition committee, and the Board having considered the same; and

WHEREAS, this Board on the 9th day of March, 1962, did adopt a resolution captioned "General Policies on Land Acquisition", which resolution, as it appears in the minutes of this Board, is incorporated herein and made a part hereof as fully as if copied herein in lines, words and figures; and

WHEREAS, this Board does now find and determine that most of the lands more particularly described in Exhibit A, attached hereto and made a part hereof, is located below the 300 foot above sea level contour and will be inundated either permanently or periodically; that the remainder of said described lands are located within one-quarter (¼) mile from the outside line of the 300 foot above sea level contour on each side of Pearl River; that all of said lands are necessary for the construction, operation and maintenance of said Reservoir, for the recreational development of the shoreline, to provide access to the Reser-

voir and its shoreline, for the control of the Reservoir and the protection of its waters from pollution, and such other uses as are authorized by law, as specified herein and to the extent applicable to these lands, specified in the said Resolution of this Board captioned "General Policies of Land Acquisition"; that the only interchange connecting the Natchez Trace Parkway with the Pearl River Reservoir is located immediately adjacent and contiguous to said lands; that part of said lands are required for the relocation of the Natchez Trace Parkway itself; that many persons will come from the Natchez Trace Parkway and will need public access and public accommodations here; that in addition to Natchez Trace Parkway traffic, Highway 43 serves a tremendous and populated area requiring public access and public accommodations; that a public park and public facilities such as boat launching facilities, picnic facilities, restaurant facilities and motel facilities will be required on said lands; that a portion of these lands are needed for a wildlife sanctuary to be prepared by the District; and

WHEREAS, this Board does further find and determine that, even if motel facilities may not be located on said lands, nevertheless all of said land is required and necessary for the other uses as herein set forth; and

WHEREAS, this Board does further find and determine that that portion of the land designated as Parcel D in Exhibit A hereto which is designated as "Part I of Tract D" in said Exhibit A and that portion of the land designated as Tract F in said Schedule A hereto, which is designated

as "Part I of Tract F" in said Exhibit A, are required by the United States of America through its agency, the United States Park Service, for the relocation of the Natchez Trace Parkway necessitated by the construction of said Reservoir; and that the title to said tracts designated as "Part I of Tract D", and "Part I of Tract F", which are being acquired by this District for conveyance to the United States of America for said relocation of the Natchez Trace Parkway, in order to meet the requirements of the United States for said relocation, must limit the exploration, development and extraction of oil, gas and other minera to directional drilling, tunnelling or such other means as will avoid the use of or disturbance of, or interference with the use and enjoyment of said lands for parkway purposes.

NOW THEREFORE, be it resolved that the Board of Directors of the Pearl River Valley Water Supply District, pursuant to the authority vested in it by the Pearl River Valley Water Supply District Act (Chapter 197, Laws of Mississippi, 1958; Sections 5956-51 to 5956-83 inclusive, of Mississippi Code of 1942, Recompiled) does hereby find and determine that the acquisition in fee, save and except minerals and royalties as defined in said Pearl River Valley Water Supply District Act, and subject to existing easements and rights of way, if any, for public roads and highways, railroads, telephone and telegraph lines, pipe lines and electric and power lines, of said lands described in Exhibit A hereof, except those lands designated as "Part I of Tract D" and as "Part I of Tract F" and that the acquisition of said lands designated and described in Exhibit A

hereto as "Part I of Tract D" and as "Part I of Tract F" in fee, subject to existing easements and rights-of-way, if any, for public roads, highways, railroads, telephone and telegraph lines, pipe lines and power lines, and reserving unto the owner of said "Part of Tract D" and "Part of Tract F" all oil, gas and other minerals, not including road building materials, which are at the date of the taking of said lands owned by the owner of each of said parts of tract, according to the land records in the office of the Clerk of the Chancery Court of Madison County, to which reference is specifically made, provided, however, that the exploration, development and extraction of oil, gas and other minerals, shall be accomplished only by directional drilling, tunnelling or such other means as will avoid the use of or disturbance of or interference with the use or enjoyment of said land for parkway purposes, are necessary for the Pearl River Valley Water Supply District project and the exercise of the powers, rights, privileges, and functions conferred upon said District by said Act; and that attempts to acquire said properties by negotiations have failed to lead to the acquisition of said properties:

BE IT FURTHER RESOLVED that the Pearl River Valley Water Supply District, acting through either its President or Vice-President and joined either by the Treasurer, the Secretary or Assistant Secretary and represented by the attorney for said Board, are hereby authorized to institute condemnation proceedings for the immediate acquisition of the above described estate in the lands de-

scribed in said Exhibit A hereto, subject, however, to the provisions of the Pearl River Valley Water Supply District Act, pursuant to any procedure provided by law, and such proceedings shall be conducted under the supervision and direction of the attorney for the Board, and said attorney is empowered to incur all expenses necessary and incidental to the conduct of proceedings for the acquisition of such property.

CERTIFICATE

SEAL

TRACT A. Owned by Floyd T. Brown. 45 acres. Specific description of the lands omitted for brevity.

TRACT B. Owned by Floyd T. Brown. 64.4 acres.

TRACT C. Owned by Floyd T. Brown. 5.6 acres.

TRACT D. Owned by Floyd T. Brown. 61.8 acres.

TRACT E. Owned by Floyd T. Brown. 27.3 acres.

TRACT F. OWNED BY J. LELAND BROWN. 34.3 acres.

TRACT G. Owned by F. Stanton Brown. 241.8 acres.

TRACT H. Owned by F. Stanton Brown. 40 acres.

TRACT I. Owned by Mrs. Amie Brown. 5 acres.

TRACT J. Owned by Mrs. Amie Brown. 5 acres.

The General Policies of Land Acquisition, composing seven typewritten pages are not included in this appendix because they state specifically they do not deal with lands above sea level contour 300.

APPENDIX C

Section 2782. Mississippi Code of 1942

Writ of Prohibition.

The legal remedy by way of prohibition is made applicable for the purposes of testing the questions (1) whether the applicant seeking to exercise the right of eminent domain is, in character, such a corporation, association, district or other legal entity as is entitled to the right and or (2) whether there is a public necessity for the taking of the particular property or a part thereof which it is proposed to condemn. All the provisions in the chapter on Quo Warranto, so far as may be, shall apply to the procedure under this section; and the petition for the writ may be filed by any defendant in the condemnation proceedings, and the hearing shall be in vacation when the public interest is such as to require an expeditious trial. Upon the filing of a petition under this section the circuit judge shall issue a temporary order staying the hearing in the court of eminent domain until the cause can be tried under this section by the circuit judge, and if on the hearing last aforesaid the petition be sustained a permanent writ of prohibition shall issue. An appeal may be taken to the Supreme Court as in other cases, but if the judgment of the circuit judge be to deny the petition, the appeal aforesaid shall not operate as a supersedeas, and the court of eminent domain may nevertheless proceed.

APPENDIX D

Section 2751. Mississippi Code of 1912

How Court organized.

When any person or corporation having the right so to do shall desire to exercise the right of eminent domain, he or it shall make application therefor in writing, and the owners of the property sought to be condemned and mortgagees, trustees, or other persons having an interest therein or a lien thereon, shall be made defendants thereto, which shall state with certainty the right and describe the property sought to be condemned, showing that of each defendant separately. The application shall be presented to the clerk of the circuit court of the county, who shall indorse thereon his appointment of a competent justice of the peace of the county in which the property, or some part thereof, is situated, to constitute, with a jury, the special court of eminent domain; and he shall fix the time and place in the county for the organization thereof.

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No. 856

IN THE SUPREME COURT OF THE UNITED STATES

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

J. LELAND BROWN, et al ..... Petitioners

vs.

PEARL RIVER VALLEY WATER SUPPLY DISTRICT ..... Respondent

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IN THE SUPREME COURT OF THE UNITED STATES

No. .....

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

J. LELAND BROWN, et al ..... Petitioners

vs.

PEARL RIVER VALLEY WATER SUPPLY DISTRICT ..... Respondent

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This is a response by the Pearl River Valley Water Supply District to the petition for a writ of certiorari to review the opinion of the Supreme Court of Mississippi rendered October 7, 1963, 156 So. 2d 572, not yet reported in the official State Reports. The arrangement of this brief will follow roughly that of the Petitioners.

JURISDICTION

In order to invoke the jurisdiction of this Court under 28 U.S.C. 1257(3), Petitioners contend, as they must, (1) that they have been deprived of their property in violation of the due process clause of the Fourteenth Amendment; and (2) that the issue of due process was raised at every available stage of both the trial and appeal below.

Jurisdiction to review this decision of the Mississippi Supreme Court is denied by Respondent on these grounds:

(1) The issue of due process under the Fourteenth Amendment is not presented by the record since it was not raised at the trial level, nor presented to the Mississippi Supreme Court on appeal;

(2) The Mississippi Supreme Court did not and was not required to decide a federal question, but rested its decision on applicable state law;

(3) In the alternative, if the due process clause of the Fourteenth Amendment can be considered as having been presented below, the decision of the Mississippi Supreme Court was in accord with applicable decisions of this Court in the field of eminent domain; and

(4) In the field of eminent domain the decision of the Supreme Court of Mississippi is not a final judgment capable of review by this Court.

STATEMENT OF THE CASE

The legislation providing for the creation of the Pearl River Valley Water Supply District was enacted as Chapter 197, General Laws of Mississippi 1958, the short title of which is "The Pearl River Valley Water Supply District Act." Pertinent portions of this act are contained in Appendix A.

Section 2 of the Pearl River Valley Water Supply District Act contains the following legislative determination and declaration of policy:

"*Legislative Determination and Declaration of Policy.* (a) It is hereby declared as a matter of legislative determination, that the waterways and surface waters of the state are among its basic resources, that the overflow and surface waters of the state have not heretofore been conserved to realize their full beneficial use, that the preservation, conservation, storage and

control of such waters are necessary to insure an adequate sanitary water supply at all times, to promote the balanced economic development of the state and to aid in flood control, conservation and development of state forests, irrigation of lands needing irrigation and pollution abatement. It is further determined and declared that the preservation, conservation, storage and control of the waters of the Pearl River and its tributaries and its overflow waters for domestic, municipal, commercial, industrial, agricultural and manufacturing purposes, for recreational uses, for flood control, timber development, irrigation and pollution abatement are, as a matter of public policy, for the general welfare of the entire people of the state.

"(b) That the creation of the Pearl River Valley Water Supply District is determined to be necessary and essential to the accomplishment of the aforesaid purposes and that this Act operates on a subject in which the state at large is interested. All the terms and provisions of this Act are to be liberally construed to effectuate the purposes herein set forth, this being a remedial Act."

In order to organize, the Act provided that the Pearl River Valley Water Commission was to petition the Chancery Court, setting forth the counties to be included, the fact that the contemplated facilities were feasible for water conservation or services contemplated by the declaration of policy, the necessity for the construction of the facilities and a map showing the general location of the reservoir and related facilities (Appendix A—§ 5).

The "project area" was limited to one mile from the shoreline of the reservoir at high water and the term "related facilities" was defined as the facilities indi-

cated on the maps or explained in the pleadings and was to include land within one mile from the high water mark, which would be used in connection within the recreational or industrial development of the project (Appendix A—§ 5).

The Act contained a provision for publication of notice to the property owners apprising them of the petition and the date of the hearing and commanding them to appear and show cause why the District should not be organized (Appendix A—§ 6). Certain designated public officials of the various counties were specifically named as parties defendant.

After compliance with all statutory requirements, the matter of the creation of the District was presented to the Chancery Court, where it was contested by two land owners and others and from a decree creating the District, these land owners appealed to the Supreme Court of Mississippi, the case being reported as *Culley v. Pearl River Industrial Commission*, 234 Miss. 783, 108 So. 2d 390 (1959). The constitutionality of the Pearl River Valley Water Supply District Act was sustained and the District proceeded with the construction of the project.

By 1962 the District had acquired approximately 43,000 acres of a contemplated 46,000 acres (R. 566) considered necessary for the project, when proceedings in eminent domain were instituted to condemn the 34.4 acres of land owned by Petitioners herein.

Petitioners immediately filed a petition for a writ of prohibition pursuant to Section 2782 of the *Miss. Code of 1942 Ann.* and charged:

(1) The application for eminent domain failed to specify a public use or necessity for the land;

(2) The taking of the land would be in violation of the Constitution of the State of Mississippi, the Constitution of the United States and the laws of the State of Mississippi;

(3) There was no public necessity for the taking; and

(4) The taking of 7.6 acres of land for the relocation of the Natchez Trace Parkway was beyond the authority of the District (R. 2-7).

These issues were denied by the District (R. 12-16).

A lengthy trial was held on the issues raised by the pleadings at the conclusion of which the lower court, sitting without a jury, found that 6.8 acres would be needed by the District for the relocation of the Natchez Trace Parkway; 7 acres would be subject to periodic inundation and authorized the condemnation of this approximate 15 acres.

The trial court prohibited the taking of 12.9 acres, ruling that the District was required to show public necessity clearly and without a doubt before homestead property could be taken. (R. 33-38). This result was reached because the trial court erroneously interpreted Section 17(x) of the Act (Appendix A) as requiring a higher degree of necessity before homestead property could be condemned.

The District appealed, and the land owners cross-appealed. Errors assigned to the Supreme Court by the District and cross-assigned by the land owners are set forth in Appendix C.

The Supreme Court of Mississippi decided the case of *Pearl River Valley Water Supply District v. Brown*, 156 So. 2d 572 (Miss. 1963), solely on applicable state law,

no federal issues having been presented. Among others the court held:

(1) That the question of public use of the land within the one-quarter mile perimeter, if utilized for access control, control of pollution and for recreational purposes, was decided in *Cullen v. Pearl River Industrial Commission*, supra, and under the principles of stare decisis would be followed by the Supreme Court of Mississippi in the *Brown* case.

(2) The burden of proof to show a lack of necessity was on the land owner who had failed to meet the burden;

(3) The trial court was in error in requiring the District to show public necessity "clearly without a doubt" and interpreted Section 11(w) of the Act as not being operable until such time as the District determined that land was surplus and unneeded; and

(4) The resolution of taking was not required to include final and detailed plans for the land use.

From this decision the land owners have petitioned the Supreme Court of the United States charging for the first time a violation of the Fourteenth Amendment by the District.

ARGUMENT

POINT A

The Supreme Court of the United States lacks jurisdiction to consider questions not raised before the highest court of a state.

A cursory examination of the record establishes that the question of federal due process under the Fourteenth Amendment was never presented to the trial court, nor to the Mississippi Supreme Court. The initial pleading filed

by the land owners, Petitioners here, to challenge the right of the Pearl River Valley Water Supply District to condemn their lands charged in the vaguest terms that the taking was in violation of "the Constitution of the State of Mississippi, the Constitution of the United States, and the laws of the State of Mississippi" (R. 4, 5). Likewise, the District answered by way of denying these allegations in equally vague language (R. 15). Thus, the Constitution of the United States was alluded to in the most general terms and the Fourteenth Amendment, much less the due process clause, was never even mentioned in the pleadings on which the issues of this case were formed.

The opinion of the trial court (R. 33, 34) makes no reference to the Fourteenth Amendment, and it is obvious that this decision rested solely upon state law. This opinion is set forth as Appendix B.

From the decision of the trial court, the District appealed, and the land owners cross-appealed to the Supreme Court of Mississippi. Nowhere in the Assignments of Error or in the Cross-Assignments of Error to the Mississippi Supreme Court can there be found the most remote inference that either party considered the due process clause of the Fourteenth Amendment as being in any way pertinent to the issues on appeal (R. 758—761) (Appendix C).

Rule 6(2) of the Revised Rules of the Supreme Court of Mississippi provides: "No error not distinctly assigned shall be argued by counsel, except upon request of the Court, but the Court may, at its option, notice a plain error not assigned or distinctly specified." See *Newsom v. Newsom*, 226 Miss. 697, 85 So. 2d 221 (1956). The Mississippi Supreme Court was, therefore, not called upon and did not decide the federal constitutional issue

here assigned. And aside from Rule No. 6(2) of the Revised Rules of the Mississippi Supreme Court, it is fundamental under the appellate practice in Mississippi, as in most courts, including this Court, that constitutional issues not raised in the lower court will not be considered for the first time on appeal. *State v. Cabana Terrace, Inc.*, 153 So. 2d 257 (Miss. 1963); *Comfort v. Landrum*, 52 So. 2d 658 (Miss. 1951); *Adams v. Board of Supervisors of Union County*, 177 Miss. 403, 170 So. 684 (1936).

Further, while it is doubtful that the issue of federal due process could have been raised on the land owners' Suggestion of Error to the Mississippi Supreme Court [which performs the function of a motion for a rehearing], there was no mention of the Federal Constitution or its violation, which is an additional indication that due process under the Fourteenth Amendment was not an issue until the land owners, Petitioners here, began to cast about to find one further forum in which to present their grievances.

This Court has repeatedly held that it is without jurisdiction to review the opinions of the state courts where no federal question was presented for decision.

A case similar in principle to the one at bar is *Wilson v. Cook*, 327 U.S. 474, 483, 90 L. Ed. 793, 801, 66 S. Ct. 663. There the plaintiffs argued for the first time before the Supreme Court of the United States that an Arkansas taxing statute as applied to them was unconstitutional since it placed a forbidden tax on the United States of America. This Court stated:

> "But we are not free to consider these grounds of attack for the reason that they were not presented to the Supreme Court of Arkansas or considered or decided by it. While the constitutional question now

sought to be presented is in some measure related to that decided by the state court, and like it, arises under the implied constitutional immunity of the Federal Government from state taxation, it is not merely 'an enlargement' of an argument made before the state Court, but is so distinct from the question decided by the state court that our decision of the issue raised there would not necessarily decide that now sought to be raised. Compare Dewey v. Des Moines, 173 U.S. 193, 197, 198, 43 L ed 665, 666, 19 S Ct 379. We are therefore not free to consider it.

"'In reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented.' New York ex rel. Cohn v. Graves, 300 US 308, 317, 81 L ed 666, 673, 57 S Ct 466, 108 ALR 721, and cases cited. For, as we said in McGoldrick v. Compagnie Generale Transatlantique, 309 US 430, 434, 435, 84 L ed 849, 851, 852, 60 S Ct 670, 'In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that

this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court." . . ."

See also *Herndon v. Georgia*, 295 U.S. 441, 79 L. Ed. 1530, 55 S. Ct. 794; *Newsom v. Smith*, 365 U.S. 604, 5 L. Ed. 2d 803, 81 S. Ct. 774; *Hulbert v. Chicago*, 202 U.S. 275, 50 L. Ed. 1026, 26 S. Ct. 617; *Bloeth v. State of New York*, Opinion of Mr. Justice Harlan March 19, 1962, 7 L. Ed. 2d 780, 82 S. Ct. 661.

It, therefore, follows that since no issue arising under the Fourteenth Amendment was presented at any stage of the proceedings below, this Court lacks jurisdiction to review the decision of the lower court.

POINT B

The decision of the Supreme Court of Mississippi on an appeal from a hearing on a petition for a writ of prohibition to enjoin eminent domain proceedings is not a final judgment capable of review by this Court.

In Mississippi the sole question of the amount of compensation is decided in the Special Eminent Domain Court, after which decision, title passes on the payment of the award. Sections 2749-2782, *Miss. Code of* 1942 *Ann.*; *Erwin v. Mississippi State Highway Commission*, 213 Miss. 885, 58 So. 2d 52 (1952).

The questions of the right to exercise eminent domain, the necessity for the taking and the public use are heard in separate proceedings, either pursuant to Section 2782 of the *Miss. Code of* 1942 *Ann.*; or by a bill for injunction in Chancery Court. *Vinegar Bend Lumber Co. v. Oak Grove & G. R. Co.*, 89 Miss. 84, 43 So. 292, 89 Miss. 117, 43 So. 299 (1907); *Dantzler v. Mississippi State Highway Commission*, 187 Miss. 721, 193 So. 4 (1940).

Primarily, the questions presented to the Supreme Court of Mississippi below concerned only necessity and public use while the question of compensation is yet pending.

In cases presenting almost identical procedural situations, this Court has held that the decisions of state courts resolving questions of public necessity and use are not final judgments when the question of just compensation remains to be decided in further proceedings.

Closely analogous is *Washington ex rel Grays H. L. Co. v. Superior Court*, 243 U.S. 251, 255, 61 L. Ed. 702, 705, 37 S. Ct. 295. There a logging company instituted a proceeding to condemn land for the purpose of maintaining a logging road. The land owners opposed the petition on the grounds that the taking was for a private use and in violation of due process. After a hearing on the question of necessity, the Superior Court entered an order of condemnation and set the case for jury trial to determine the amount of compensation. The land owner appealed to the Supreme Court of Washington for the purpose of reviewing the constitutionality of the act and the right to condemn their property. The decision of the lower court was affirmed. A writ of error was sued out from the Supreme Court of the United States.

The condemnor asserted that the decision of the Supreme Court of Washington was not final; and the landowner responded saying that under the practice of the State of Washington, the judgment was final since after the amount of compensation had been determined, under Washington decisions the sole issue on appeal was the justness of the damages. This Court held:

"[W]e cannot regard a condemnation proceeding taken under the authority of the Constitution of Wash-

ington and the Act of 1913 as severable into two distinct branches. The Constitution forbids that the property be taken without compensation first made or ascertained and paid into court for the owner, and, of course, in case of controversy, compensation cannot be made to the owner until the amount of it has been ascertained. It follows that the judgment entered by the superior court to the effect that petitioner was entitled to condemn and appropriate the land in question for its right of way must be construed as being subject to a condition that the proper compensation be first ascertained and paid.

"As we read the decisions of the supreme court of the state, such judgments are not interpreted in any other sense; they are not described as final, nor as independent judgments . . ."

See also *Catlin v. U. S.*, 324 U.S. 229, 89 L. Ed. 911, 65 S. Ct. 631; *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 92 L. Ed. 1212, 68 S. Ct. 972.

The rationale of these decisions is that the Supreme Court of the United States should not be called upon to hear litigation piece-meal. Since compensation in the instant case remains to be resolved, and particularly in view of the history of these litigants, it is entirely conceivable that this Court will be called upon in the future to consider issues arising from the proceedings to determine the amount of just compensation.

Thus, it is submitted that the decision of the Mississippi Supreme Court was not final within the purview of 28 U.S.C. 1257(3). Therefore, the decision of the Supreme Court of Mississippi is not ripe for review by this Court.

IN REBUTTAL

POINT 1.

The resolution of taking conforms to the requirements of due process under both state and federal law.

Basically the argument under Point 1, and which was also made in The Statement of The Case, is that the resolution of taking is jurisdictional in Mississippi, and because the District failed to state in its resolution the detailed and final plans for the uses to which Petitioners' property was to be put, the resolution was defective to the extent that sanction by the Supreme Court of Mississippi below constituted a violation of due process under the Fourteenth Amendment.

An examination of the authorities cited in support of this contention shows that the resolution did not violate Mississippi law or the Mississippi Constitution, much less the Federal Constitution.

First, contrary to Petitioners' contention, Section 2751 of the *Miss. Code of* 1942 *Ann.* (Appendix D to the Petition) does not make the resolution for taking jurisdictional. In fact, this Section does not pertain to the District's legislative determination of necessity at all, but instead is concerned with the application, or pleading, which initiates the eminent domain proceedings in Mississippi. For the purposes of the application all that is required is a statement showing the right and describing the property sought to be condemned. When Section 2751 is construed in connection with Section 2782 of the *Miss. Code of* 1942 *Ann.* (Appendix C to the Petition), which is the statutory proceeding for a writ of prohibition to determine: (1) whether the applicant is entitled to the right; and (2) whether there is a public necessity; it is apparent that the examination of the right pertains to

the legal authority of the applicant to exercise the power of eminent domain and not to the sufficiency of the resolution for taking.

Second, the case of *Ferguson v. Seward*, 146 Miss. 613, 111 So. 596 (1927), simply held that the failure of the board of supervisors to adjudicate the public necessity for the taking of a way for a public road as required by state law was fatal. Here the District clearly determined the necessity for the taking by its resolution, the controversy being whether the resolution sufficiently apprised the land owners of the uses to which their lands would be put and the state court has held affirmatively.

Third, the case of *City of Jackson v. Craft*, 36 So. 2d 149 (Miss. 1948) was not concerned with a resolution for taking or with eminent domain proceedings. There a state statute was enacted authorizing municipalities to acquire land and construct downtown parking facilities for the purpose of relieving traffic congestion. The Act provided that cities could adopt an ordinance declaring that it was necessary for the municipality to operate a parking facility. It provided that notice of the adoption of the ordinance would be published three times specifying a date and place for the hearing of objections, if any. The notice was not required to describe or specify the contemplated location of the parking facility. On the date given in the notice the governing authority of the municipality was to consider the objections, if any, and enter a final order, either rescinding or modifying the ordinance or authorizing the municipality to proceed with the establishment of the facility. The city council adopted the ordinance and did not include a description of the property. Upon challenge, the Supreme Court of Mississippi held that the statute by necessary implication required that the ordinance describe or specify the

contemplated location of the facility and because it failed in this respect the ordinance was void. The reasoning of the court was that unless there was a description of the proposed location somewhere in the ordinance, the citizens would for practical purposes be precluded from appearing and intelligently voicing their objections. The *Craft* case had nothing to do with eminent domain proceedings and has no application to the present factual situation.

Contrary to Petitioners' claim, the action of the District was not afoul of the decision of the Supreme Court of the United States in *City of Cincinnati v. Vester*, 281 U.S. 439, 74 L. Ed. 604, 50 S. Ct. 360, for there it was determined that the condemnation for excess purposes had not been done in accord with the requirements of Ohio law. This is not the situation here for two reasons: first, no excess taking is involved; and second, the Supreme Court of Mississippi has sanctioned the proceedings of the District as being in conformity with the laws of Mississippi. The inapplicability of the *Vester* case in a similar situation was recognized by this Court in *U. S. ex rel Tennessee Valley Authority v. Welch*, 327 U.S. 546, 552, 90 L. Ed. 843, 848, 66 S. Ct. 715.

". . . It is true that this Court did say in Cincinnati v. Vester, 281 US 439, 446, 74 L ed 950, 955, 50 S Ct 360, that 'It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one.' But the Court's judgment in that case denied the power to condemn 'excess' property on the ground that the state law had not authorized it. And in Hairston v. Danville & W. R. Co., 208 US 598, 607, 52 L ed 637, 641, 28 S Ct 331, 13 Ann. Cas 1008, this Court, referring to the 'rule' later

stated in the Vester Case, said that "*No case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the State Court as a taking for public uses in conformity with its laws.*' . . . " (Emphasis added)

And it can hardly be argued that the District's failure to be more specific in its resolution is a fundamental deprivation of due process when the resolution conforms in all respects with the general federal condemnation procedures prescribed by Rule 71A of the Federal Rules of Civil Procedure which requires "a short plain statement of the authority for the taking, the use for which the property is to be taken, and a description of the property sufficient for its identification."

POINT 2.

The inclusion of separate tracts in the resolution for taking did not violate due process of law, state or federal.

Petitioners argue here that the resolution of taking violated due process because it included ten tracts of land belonging to four different owners in the same resolution. Cited as authority is Section 2751 of the *Miss. Code of* 1942 *Ann.* Petitioners apparently fail to comprehend that Section 2751 pertains to the application or pleading, which is filed to initiate eminent domain proceedings and not to the resolution of taking, which is simply the entry in the minutes showing the District's legislative determination that the lands are necessary. State law being entirely silent as to the requirements of a resolution for taking, there can be no fundamental deprivation of due process simply because the District's resolution for taking determined simultaneously that the lands of four persons were necessary for the public use

in this multi-purpose project. Particularly when these four persons owned ten contiguous tracts of land comprising in excess of six hundred and thirty acres which were being farmed as a family enterprise prior to and at the time of the trial (R: 467, 484).

Even if the District had included the lands of more than one person in its application for condemnation, which it did not, it is difficult to understand how due process would have been violated since by Rule 71 A(b) of the Federal Rules of Civil Procedure the condemnor is specifically authorized to join in the same action one or more separate pieces of property.

At most, the issues raised under Point 2 constitute nothing more than questions of state law.

POINT 3.

The Act authorizes condemnation for recreational purposes.

Here it is argued that the Pearl River Valley Water Supply District Act does not permit the acquisition of land within the one-quarter mile perimeter for public parks and for recreational purposes by power of eminent domain. The Supreme Court of Mississippi below found that there were three uses for Petitioners' lands, these being control of pollution, control of access to the reservoir and to provide recreation. Arguendo, if the District is not authorized to acquire this land for recreational purposes, it is certainly authorized to acquire it by condemnation for the uses of pollution control and control of access to the reservoir. Therefore, this question is moot. Furthermore, the interpretation of the *Brown* case has become settled law in Mississippi for in the case of *Pearl River Valley Water Supply District v. Mrs. Hazel Wood*, decided February 24, 1964 (Appendix D),

not yet reported, the Supreme Court of Mississippi followed the *Brown* case on a closely analogous set of facts, holding that the District was entitled to acquire land in the one-quarter mile perimeter by condemnation not only for the purposes of access control but for recreational facilities also.

POINT 4

As interpreted by the Supreme Court of Mississippi, the Act authorizes condemnation of dry land for purposes of pollution control.

In Point 4 the Petitioners contend the District had no authority to condemn land for pollution abatement. At most, this argument presents a question of statutory interpretation under state law, which has been resolved in favor of the District by the Supreme Court of Mississippi on three occasions. *Culley v. Pearl River Industrial Commission*, 234 Miss. 783, 108 So. 2d 390 (1959); *Pearl River Valley Water Supply District v. Brown*, 156 So. 2d 572 (Miss. 1963); and *Pearl River Valley Water Supply District v. Mrs. Hazel Wood*, (Miss. 1964). (Appendix D).

POINT 5

The Supreme Court of Mississippi has determined that the lands in controversy are for public and not private uses.

Here it is urged that the proposed condemnation was an attempt to take private property for private use. The Petitioners argue, contrary to the findings of the Supreme Court of Mississippi, that the real reasons for the taking were not for pollution control, access control and for recreational purposes, but rather for the construction of commercial facilities. As recognized in *County of*

Allegheny v. Frank Mashuda Co., 360 U.S. 185, 3 L. Ed. 2d 1163, 79 S. Ct. 1060, in a similar situation this argument presents for decision the purely factual question of whether Petitioners' lands are being sought for private rather than for public use. The Supreme Court of Mississippi has resolved these facts against the Petitioners, thus no federal question is presented.

POINT 6.

The extent of the estate acquired for the relocation of the Natchez Trace Parkway presents a matter of the construction of a state statute and not a federal question.

It is next urged that the taking of 7.6 acres for the relocation of the Natchez Trace Parkway violates the Fourteenth Amendment since the District seeks to condemn the fee for this purpose rather than an easement or right-of-way. This argument presents a question of statutory construction arising under state law and not a federal question.

The controversy arises over the interpretation of Sections 11(f) and 11(g) of the Pearl River Valley Water Supply District Act. Section 11(f) confers upon the District the authority "to acquire by condemnation any and all property of any kind, real, personal or mixed, or any interest therein within the project area not exceeding one-quarter mile from the outside line of the three hundred (300) foot above sea level contour on each side of Pearl River except as provided for rights-of-way under Subsection (g) . . . necessary for the project and the exercise of the powers, rights, privileges and functions conferred upon the District by this Act." In limiting the power of eminent domain thus conferred to "not

exceeding one-quarter mile", the Lesgislature made an exception to that limitation, namely the acquisition of rights-of-way under Section (g). Section (f) continues: "For the purpose of carrying out this Act the right of eminent domain of the District . . . shall be sufficient to enable the acquisition of county roads, state highways or other public property in the project area and the acquisition, or relocation of the above mentioned utility property in the project area; . . . ."

Section 11(g) provides: "It is further provided that the District is hereby authorized to acquire easements or rights-of-way in or outside of the project area for the relocation of such roads, highways, railroads, . . . and to convey the same to the owners thereof in connection with such relocation as a part of the construction of the project. . . ."

Thus, the statute plainly contemplates and provides for the acquisition by condemnation of the fee for relocation of the Natchez Trace Parkway within the one-quarter mile limit and the acquisition by condemnation of easements or rights-of-way for such relocation beyond the one-quarter mile limit.

The Supreme Court of Mississippi below was of the opinion that the interpretation of these sections failed to present any issue since it stated on page 40: "That part of Appellees' land to be used for relocating the Natchez Trace and that part which will be below contour three hundred (300) feet above sea level involved uses so obviously public that discussion thereof is unnecessary."

Again, the argument here presents only a question of statutory construction arising under state law and not a federal issue.

POINT 7:

Whether 6.8 acres will be flooded is a question of fact.

Any statements concerning whether 6.8 acres would be subject to flooding involves a question of fact which this Court is not called upon to review.

POINT 8.

The Act is constitutional when measured against both federal and state concepts of due process.

In Point 8 Petitioners contend that the Pearl River Valley Water Supply District Act is unconstitutional on its face. This charge of invalidity is based primarily on Section 11(f)(3), which authorizes the District to rent, lease or sell land to others for the purpose of operating recreational facilities in connection with the project. In *Culley v. Pearl River Industrial Commission*, supra, the Act was challenged on the same ground as being in violation of the Mississippi Constitution and the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of Mississippi upheld the constitutionality of the Act, saying: (1) it would be presumed that the District would lease and sell lands acquired by condemnation for public purposes; and (2) leases and sales would have to contain restrictions which would insure the public functions of the District, otherwise they would be void. This holding followed *Albritton v. City of Winona*, 181 Miss. 75, 178 So. 799, cited in the *Culley* case.

In *Berman v. Parker*, 348 U.S. 26, 33, 99 L. Ed. 27, 38, 75 S. Ct. 98, cited in *Culley*, the Supreme Court of the United States was called upon to consider a similar grant of authority in the District of Columbia Redevelopment Act of 1945. Section 2 of the Act provided for the acquisition and assembly of real property and the leasing

or sale for redevelopment pursuant to a project area redevelopment plan. The legislative power of Congress was challenged under the Fifth Amendment as depriving the owners of their property without due process since the taking amounted to authorizing the condemnation of private property for private use. The Supreme Court rejected this argument, saying:

> "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. See Luxton v. North River Bridge Co. 153 U.S. 525, 529, 530, 38 L ed 808, 810, 14 S Ct 891; United States v. Gettysburg Electric R. Co. 160 US 668, 679, 40 L ed 576, 580, 16 S Ct 427. Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. See Luxton v. North River Bridge Co. (US) supra; cf. Highland v. Russell Car & Snow Plow Co., 279 US 253, 73 L ed 688, 49 S Ct 314. The public end may be as well or better served through an agency of private enterprise than through a department of government —or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects . . . ."

The applicability of the *Berman* case is in no way impaired because the challenge was to the Fifth Amend-

ment rather than to the Fourteenth Amendment. In matters of substantive due process the principles applied under the Fifth Amendment are equally applicable to the Fourteenth Amendment. *Carroll v. Greenwich Ins. Co.*, 199 U.S. 501, 50 L. Ed. 246.

The Pearl River Valley Water Supply District Act has been determined by the Mississippi Supreme Court as meeting the requirements of the Constitution of the State of Mississippi, and in view of the principles announced by this Court in the *Welch* and *Berman* cases, the Act is entirely consonant with the due process requirements of the Fourteenth Amendment.

The contention that the application of stare decisis to the pronouncements of the *Culley* case amounts to a violation of due process is without substance or authority. Until such time as fundamental concepts of federal due process in the field of eminent domain or the declared policy of the State of Mississippi change, the Supreme Court of Mississippi is free to consider the *Culley* case as controlling its decisions. There is no authority to the contrary.

CONCLUSION

For the reasons set forth in this Response, it is respectfully submitted that the Petition for a Writ of Certiorari to review the decision of the Supreme Court of the State of Mississippi should be denied.

Respectfully submitted,

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CERTIFICATE

I, L. Arnold Pyle, the Attorney for the Respondent herein, and a Member of the Bar of the Supreme Court of the United States, do hereby certify that on the 26th day of March, 1964, I served five printed copies of the foregoing Response to the Petition for a Writ of Certiorari to the Supreme Court of the State of Mississippi on the Honorable James P. Coleman, Attorney at Law, Ackerman, Mississippi, Attorney for J. Leland Brown and Mrs. Amie Brown, by United States mail, in a duly addressed envelope, postage prepaid.

L. Arnold Pyle
Attorney for Pearl River Valley
Water Supply District, Respondent

APPENDIX A

THE PEARL RIVER VALLEY WATER SUPPLY DISTRICT ACT

Chapter 197, Laws of Mississippi of 1958
(Pertinent Provisions)

Creation of District

Section 3. *Creation of district, petition.* The Pearl River Industrial Commission, acting through its members who favor bringing the counties they represent into the Pearl River Valley Water Supply District, shall petition the chancery court of the First Judicial District of Hinds County to organize and establish the Pearl River Valley Water Supply District and shall set forth in the petition:

(a) The counties to be included in the Pearl River Valley Water Supply District. Any county through which the Pearl River runs or which borders on the Pearl River may be included in the District.

(b) The fact that a preliminary report or study to determine the engineering feasibility of constructing a dam and reservoir in the basin of Pearl River has been made by a competent engineer or engineering firm and that such study or report shows that the construction of such facilities is feasible for water conservation or supply or for any of the other purposes or services contemplated by the legislative declaration of public policy in this Act.

(c) The necessity and desirability for the construction of such facilities.

(d) A general description of the purposes of the contemplated works, and a general description of the plan

including the lands to be overflowed or otherwise affected thereby, and maps or plats showing the general location of the reservoir and dam and related facilities. The word "project" when used herein shall mean the general plan and purposes of the Pearl River Valley Water Supply District, including its physical properties, as set out in this petition to the Chancery Court and the words "project area" shall mean the physical location of the reservoir, dam and related facilities as shown on the plats filed with the Chancery Court and shall include and be limited to an area of one (1) mile from the shore line of the reservoir at high water. The words "related facilities" as used in this Act shall mean the facilities indicated on said maps or plats filed with the Chancery Court or otherwise explained in the pleadings filed with the Chancery Court and shall include property, land or areas of land, adjacent to, or in the vicinity of, said reservoir or dam and within a distance of one (1) mile from the high water mark of the proposed shore line of said reservoir as shown on said map, which may be acquired, owned, rented, leased or sold by the District in connection with the recreational or industrial development and use of the Project.

The petition shall be filed with as many copies as there are parties defendant. A copy of the preliminary report or study shall be attached to the original and each copy of the petition as an exhibit.

The Board of Water Commissioners shall be made a party defendant, and the Chancery Clerk shall furnish the Board of Water Commissioners with a copy of the petition with attached exhibits. Each county named in the Petition shall be joined as a party defendant by service of process on the president of the Board of Supervisors thereof, and the Chancery Clerk shall furnish a

copy of the petition to each such President. Whenever any municipality having a population according to the most recent Federal Census of ten thousand (10,000) or more is included in such proposed district, such municipality shall be made a party defendant.

It shall not be necessary that any land owners in the counties to be included in said proposed district be named in the petition, or made parties defendant. The chancellor of the chancery court of the First Judicial District of Hinds County, Mississippi, shall have jurisdiction of the entire water supply district and project area for the purposes of this Act. Such jurisdiction may be exercised by the chancellor in term time or in vacation, as provided in this Act.

Proceedings after Petition Filed including Notice

Section 6. *Proceedings after petition filed.* The Board of Water Commissioners shall make a written report on the preliminary study or plans furnished them, and shall within thirty (30) days after receipt of the said study file such report with the Chancery Court setting forth their recommendations concerning the proposed water supply district. After the filing of the report of the Board of Water Commissioners, and upon motion of the petitioners, the chancellor shall enter an order fixing the date for a hearing of the cause on the original petition, the exhibit, the report and recommendations of the Board of Water Commissioners and any answers filed or other pleadings. The chancery clerk shall give notice of such hearing to all persons interested by posting notices thereof at the door of the courthouse of the county or counties in which the district is situated, and in at least ten public places in said proposed district, and also by publishing said

notice at least once a week for three consecutive weeks in a newspaper published in Hinds County and in a newspaper published in each of the other counties proposed to be included in such water supply district. If there is no newspaper published in any such county, then it shall be sufficient to publish said notice in a newspaper having a general circulation in such county. Such notice shall be addressed to the property owners and qualified electors of such proposed district and all other persons interested, shall state when and in what court said petition was and is filed, shall state the counties included in such district, and shall command all such persons to appear before the chancery court, or the chancellor in vacation, at the Chancery Court Building in the First Judicial District of Hinds County, upon the date fixed by the chancellor, to show cause, if any they can, why the proposed water supply district should not be organized and established as prayed for in said petition. The date for such hearing shall not be less than twenty-one (21) days nor more than forty (40) days after the last publication of such notice. It shall be sufficient in describing the lands to be included in the water supply district to name the counties to be included therein in the publication or notice hereinbefore mentioned.

If the court or chancellor finds that the notice or publication was not given as provided for in this Act, it shall not thereby lose jurisdiction, but the court or chancellor shall order due publication or notice to be given and shall continue the hearing until such publication or notice shall be properly given, and the court or chancellor shall thereupon proceed as though publication or notice had been properly given in the first instance.

Powers of District

Section 11. *Powers of District.* The Pearl River Valley Water Supply District through its board of directors is hereby empowered:

(a) To impound overflow water and the surface water of the Pearl River or its tributaries within the project area within or without such district at such place or places and in such amount as may be approved by the Board of Water Commissioners of the State of Mississippi, by the construction of a dam or dams, reservoir or reservoirs, works, plants and any other necessary or useful related facilities contemplated and described as a part of the project within or without the District, to control, store and preserve such waters, and to use, distribute, and sell the same. The Pearl River Valley Water Supply District is also empowered to construct or otherwise acquire within the project area, all works, plants, or other facilities necessary or useful to the project for the purpose of processing such water and transporting it to cities and others for domestic, municipal, commercial, industrial, agricultural and manufacturing purposes and is hereby given the power to control open channels for water delivery purposes.

(b) To acquire and develop any other available water necessary or useful to the project and to construct, acquire, and develop all facilities within the project area deemed necessary or useful with respect thereto.

(c) To prevent or aid in the prevention of damage to person or property from the waters of the Pearl River or any of its tributaries.

(d) To forest and reforest, and to aid in the foresting and reforesting of the project area, and to prevent and to aid in the prevention of soil erosion and floods within

said area; to control, store and preserve within the boundaries of the project area the waters of the Pearl River or any of its tributaries, for irrigation of lands and for prevention of water pollution.

(e) To acquire by purchase, lease, gift or in any other manner (otherwise than by condemnation) and to maintain, use and operate any and all property of any kind, real, personal or mixed, or any interest therein within the project area, within or without the boundaries of the District, necessary for the project and convenient to the exercise of the powers, rights, privileges and functions conferred upon the District by this Act;

(f) To acquire by condemnation any and all property of any kind, real, personal or mixed, or any interest therein, within the project area not exceeding one quarter mile from the outside line of the 300 foot above sea level contour on each side of Pearl River except as provided for rights of way under Subsection (g) of this section, within or without the boundaries of the District necessary for the project and the exercise of the powers, rights, privileges and functions conferred upon the District by this Act, according to the procedure provided by law for the condemnation of lands or other property taken for rights of way or other purposes by railroads, telephone or telegraph companies. For the purposes of carrying out this Act the right of eminent domain of such District shall be superior and dominant to the right of eminent domain of railroad, telegraph, telephone, gas, power and other companies or corporations and shall be sufficient to enable the acquisition of county roads, state highways or other public property in the project area, and the acquisition, or relocation, of the above mentioned utility property in the project area; provided however that Mississippi Highway 43 as presently located shall be kept open as part of

the State Highway system. The cost of right-of-way purchases, re-routing, and/or elevating all other county maintained roads affected by construction of the said reservoir shall be borne by the said water district and new construction shall be of equal quality as in roads existing at the time of passage of this Act.

The amount and character of interest in land, other property and easements thus to be acquired shall be determined by the Board of Directors and their determination shall be conclusive and shall not be subject to attack in the absence of manifold abuse of discretion or fraud on the part of such Board in making such determination. Provided, however,

(1) In acquiring lands, either by negotiation or condemnation, the District shall not acquire minerals or royalties within the project area; sand and gravel shall not be considered as minerals within the meaning of this section; and

(2) No person or persons owning the drilling rights or the right to share in production shall be prevented from exploring, developing or producing oil or gas, with necessary rights of way for inress and egress, pipe lines and other means of transporting such products by reason of the inclusion of such lands or mineral interests within the project area, whether below or above the water line, but any such activities shall be under such reasonable regulations by the Board of Directors as will adequately protect the reservoir, and

(3) In drilling and developing, such persons be and are hereby vested with a special right to have such mineral integrated and their lands developed in such drilling unit or units as the State Oil and Gas Board shall

establish after due consideration of the rights of all of the owners to be included in the drilling unit.

Provided further that where any site or plot of land is to be rented, leased or sold to any person, firm or corporation for the purpose of operating recreational facilities thereon for profit, then the Board shall, by resolution, specify the terms and conditions of such sale, rental or lease, and shall advertise for public bids thereon. When such bids are received, the same shall be publicly opened by the Board, and the Board shall thereupon determine the highest and best bid submitted, and shall immediately notify the former owner of such site or plot of the amount, terms and conditions of such highest and best bid. Such former owner of such site or plot shall have the exclusive right at his option, for a period of thirty (30) days after the determination of the highest and best bid by the Board, to rent, lease or purchase said site or plot of land, by meeting such highest and best bid, and by complying with all terms and conditions of such renting, leasing or sale, as specified by the Board; provided, however, the Board shall not in any event, rent, lease or sell to any former owner more land than was taken from such former owner for the construction of the project, or one-quarter mile of shoreline, whichever shall be the lesser. If such option is not exercised by such former owner within said period of thirty (30) days, then the Board shall accept the highest and best bid submitted.

(g) To require the necessary relocation of roads and highways, and railroad, telephone and telegraph lines and properties, electric power lines, gas pipe lines and mains and facilities in the project area or to require the anchoring or other protection of any of these, provided, due compensation is first paid the owners thereof, or agreement is had with such owners regarding the pay-

ment of the cost of such relocation. It is further provided that the District is hereby authorized to acquire easements or rights of way in or outside of the project area for the relocation of such roads, highways, railroad, telephone and telegraph lines and properties; electric power lines, gas pipe lines and mains and facilities and to convey the same to the owners thereof in connection with such relocation as a part of the construction of the project; provided, however, the directors of the District shall not close any public access road to the reservoir existing prior to the construction of the reservoir unless the Board of Supervisors of the county in which such road is located agrees thereto.

(h) To overflow and inundate any public lands and public property, including sixteenth section lands and in lieu lands within the project area.

(i) To construct, extend, improve, maintain and reconstruct, to cause to be constructed, extended, improved, maintained and reconstructed, and to use and operate, any and all facilities of any kind within the project area necessary or convenient to the project and to the exercise of such powers, rights, privileges and functions;

(j) To sue and be sued in its corporate name;

(k) To adopt, use and alter a corporate seal;

(l) To make by-laws for the management and regulation of its affairs;

(m) To employ engineers, attorneys, and all necessary agents and employees to properly finance, construct, operate and maintain the project and the plants and facilities of the District and carry out the provisions of this Act and to pay reasonable compensation for such services; for all services in connection with the issuance

of bonds as provided in this Act, the attorney's fee shall not exceed one quarter of one per cent (¼ of 1%) of the principal amount of said bonds. For any other services, only reasonable compensation shall be paid for such other services. The board shall have the right to employ a general manager, who shall, at the discretion of the board, have the power to employ and discharge employees. Without limiting the generality of the foregoing, it may employ fiscal agents or advisors in connection with its financing program and in connection with the issuance of its bonds.

(n) To make contracts and to execute instruments necessary or convenient to the exercise of the powers, rights, privileges and functions conferred upon it by this Act;

(o) To make or cause to be made surveys and engineering investigations relating to the project, or related projects, for the information of the District, to facilitate the accomplishment of the purposes for which it is created.

(p) To apply for and accept grants from the United States of America, or from any corporation or agency created or designated by the United States of America, and to ratify and accept applications heretofore or hereafter made by voluntary associations to such agencies for grants to construct, maintain or operate any project or projects which hereafter may be undertaken or contemplated by said District;

(q) To do any and all other acts or things necessary or convenient to the exercising of the powers, rights, privileges or functions conferred upon it by this Act or any other Act of law.

(r) To make such contracts in the issuance of bonds as may be necessary to insure the marketability thereof.

(s) To enter into contracts with municipalities, corporations, districts, public agencies or political subdivisions of any kind and others for any services, facilities or commodities which the project may provide. The District is also authorized to contract with any municipality, corporation or public agency for the rental, leasing, or purchase of, or for the operation of the water production, water filtration or purification, water supply and distributing facilities of such municipality, corporation or public agency upon such consideration as the District and such entity may agree. Any such contract may be upon such terms and for such time as the parties may agree, and it may provide that it shall continue in effect until bonds specified therein and refunding bonds issued in lieu of such bonds are paid. Any such contract with any political subdivision shall be binding upon said political subdivision according to its terms and such municipalities or other political subdivisions shall have the power to enter into such contracts, as in the discretion of the governing authorities thereof would be to the best interest of the people of such municipality or other political subdivision and such contracts may include within the discretion of such governing authorities a pledge of the full faith and credit of such political subdivisions for the performance thereof.

(t) To fix and collect charges and rates for any services, facilities or commodities furnished by it in connection with said project and to impose penalties for failure to pay such charges and rates when due.

(u) To operate and maintain within the project area with the consent of the governing body of any city or town located within the District, any works, plants or facilities of any such city deemed necessary or convenient

to the accomplishment of the purposes for which the district is created.

(v) Subject to the provisions of this Act, from time to time to lease, sell or otherwise dispose of any property of any kind, real, personal or mixed, or any interest therein, within the project area or acquired outside the project area as authorized in this Act, for the purpose of furthering the business of the District.

(w) When in the opinion of the Board of Directors as shown by resolution duly passed, it shall not be necessary to the carrying on of the business of the District that the District own any lands acquired, then the Board shall advertise such lands for sale to the highest and best bidder for cash, and shall receive and publicly open the bids thereon. The Board shall, by resolution, determine the highest and best bid submitted for such land, and shall thereupon notify the former owner, his heirs or devisees, by registered mail, of the land to be sold and the highest and best bid received therefor, and such former owner, or his heirs or devisees, shall have the exclusive right at his or their option for a period of thirty (30) days in which to meet such highest and best bid and to purchase said property.

(x) Any bona fide, resident householder, actually living or maintaining a residence on land taken by the District by condemnation shall have the right to repurchase not exceeding forty (40) acres of his former land or other available land from the Board of Directors for a price not exceeding the price paid for condemning his land.

Parks and Recreation Facilities

Section 13. *Park and recreation facilities.* The Pearl River Valley Water Supply District is authorized to establish or otherwise provide for public parks and recre-

ation facilities, and for the preservation of fish and wildlife, and to acquire land otherwise than by condemnation except as provided in Section 11 (f) for such purposes, within the project area.

Rules and Regulations

Section 14. *Rules and Regulations.* (a) The Board of Directors of the District shall have the power to adopt and promulgate all reasonable regulations to secure, maintain and preserve the sanitary condition of all water in and to flow into any reservoir owned by the District, to prevent waste of water or the unauthorized use thereof, and to regulate residence, hunting, fishing, boating, and camping, and all recreational and business privileges, along or around any such reservoir or any body of land or easement owned by the District.

(b) Such District may prescribe reasonable penalties for the breach of any regulation of the District.

APPENDIX B

OPINION OF TRIAL COURT IN THE CIRCUIT COURT OF MADISON COUNTY

No. 663

PEARL RIVER VALLEY
WATER SUPPLY DISTRICT

vs.

J. LELAND BROWN, ET AL

OPINION

On June 13, 1962 the Pearl River Valley Water Supply District filed an application for the action of eminent domain, seeking to condemn 34.3 acres belonging to Mr. and Mrs. J. Leland Brown, husband and wife. On June 29, 1962 Mr. and Mrs. Brown filed a petition in this Court for a writ of prohibition to prevent the condemnation of said parcel of land.

The land involved is the homestead of Mr. and Mrs. Brown. The Act states that such persons "*Shall* have the right to repurchase not exceeding 40 acres of his former land or other available land." This section contemplates the taking but turns right around and says that such resident shall have the right to re-purchase. This is confusing. But due to the fact that the provision is in the statute it is my opinion that public necessity should be clearly and without doubt shown before a person's homestead may be taken.

We must view the situation as it existed on April 6, 1962, the date of the resolution declaring the necessity for the condemnation of the lands of Floyd T. Brown and others.

Therefore, it is my opinion that on that date the evidence shows as follows:

1. That 7.4 acres of the 34.3 acres are below the three hundred feet above sea level contour and may be subject to inundation from time to time. The public necessity is shown for the taking of this parcel.

2. The evidence shows that 7.6 acres of the 34.3 acres are needed for the relocation of the Natchez Trace. It is my opinion that there is authority for the taking for such a purpose and that there is a public necessity for so doing.

3. It is my opinion that on April 6, 1962 that there was no public necessity for the taking of the remainder, to wit, 19.3 acres of the 34.3 acres.

An order may be taken setting aside the injunction as to 7.4 acres which may be subject to inundation and 7.6 acres for the relocation of the Natchez Trace. The injunction is made perm[illegible] as to the remainder, to wit, 19.3 acres.

This the 28th day of February, 1963.

LEON F. HENDRICK
CIRCUIT JUDGE

APPENDIX C

ASSIGNMENTS OF ERROR TO THE SUPREME COURT OF MISSISSIPPI

ASSIGNMENT OF ERRORS

Comes now Appellant, Pearl River Valley Water Supply District, and submits this, its Assignment of Errors, and would show unto the Supreme Court of the State of Mississippi that the Circuit Court of Madison County, Mississippi committed reversible error in the trial of this case and in entering its Order prohibiting the condemnation of a portion of the lands in question for the following reasons, to-wit:

1. The Lower Court erred in making permanent in part the temporary Writ of Prohibition, thereby preventing the condemnation of 19.9 acres of the lands in question.

2. The Lower Court erred in permitting the witness Murray, a member of the Board of Directors, to express his opinions as to the necessity for the taking.

3. The Lower Court erred in not sustaining Appellant's motion to exclude the evidence of Appellees and to find for the Appellant.

CROSS ASSIGNMENT OF ERRORS

Come now the appellees, J. Leland Brown and Mrs. Annie Brown, and respectfully submit this, their cross assignment of errors, constituting a reversible error by the Circuit Court of Madison County, Mississippi, in the trial of this case and in entering its order dissolving the temporary writ of prohibition prohibiting the condemnation of a portion of appellees' lands and assign the following reason, to-wit:

I.

The trial court erred in denying appellees' motion to strike the bill of particulars and in failing to sustain appellees' motion requiring appellant to particularize as to the use or uses of the lands in question.

II.

The trial court erred in sustaining appellant's objections to request that members of the Board of Directors of the appellant be placed upon the stand as adverse witnesses.

III.

The trial court erred in overruling appellees' motion for permanent writ of prohibition.

IV.

The trial court erred in overruling appellees' motion to dismiss allegations as to acquisition of property for Natchez Trace.

V.

The trial court erred in dissolving the temporary writ of prohibition theretofore granted as to 14.4 acres of appellees' land.

VI.

The trial court erred in permitting evidence offered by the appellant and objected to by appellee.

VII.

The trial court erred in sustaining the objection to evidence offered by the appellees and objected to by appellant.

APPENDIX D

CASE DECIDED BY SUPREME COURT OF MISSISSIPPI

ON FEBRUARY 24, 1964

IN THE SUPREME COURT OF MISSISSIPPI

No. 42,992

PEARL RIVER VALLEY WATER SUPPLY DISTRICT, APPELLANT AND CROSS-APPELLEE

vs.

MRS. HAZEL A. WOOD, APPELLEE and CROSS-APPELLANT

PATTERSON, JUSTICE:

The Pearl River Valley Water Supply District, appellant and cross-appellee here, filed suit to condemn 113 acres of land in Madison County owned by appellee and cross-appellant, Mrs. Hazel A. Wood. The land was sought by the District for the purposes hereinafter mentioned in connection with the construction and development of a reservoir and related facilities in accordance with authority granted the District by Chapter 197, Laws of 1958. Mrs. Hazel A. Wood, the owner, was made defendant in the eminent domain suit. Hereinafter the Pearl River Valley Water Supply District will be referred to as the District and Mrs. Hazel A. Wood will be referred to as the owner.

Before the condemnation suit was tried the owner filed in circuit court a petition for a writ of prohibition. In this petition reference was made to the eminent domain suit then pending appertaining to these lands. A temporary writ of prohibition was issued pending a hearing

on the merits. Of the 113 acres originally sought by the District, 31.7 acres was for conveyance to the Department of Interior for the relocation of the Natchez Trace Parkway. Prior to the trial on the merits an agreed order was entered dismissing from litigation this 31.7 acres of the original 113 acres, leaving in controversy 82.1 acres. At the conclusion of the trial the circuit court, in a written opinion, found the north 42.1 acres of the 82.1 acre tract was needed by the District in order to have access by water underneath the relocated Natchez Trace for the purpose of establishing a marina or boat landing and to provide certain related facilities in connection therewith. Of this one-half, he found that 1.9 acres was below the 296 foot contour line and 5.6 acres was below the 300 foot contour line. He further found the remaining acreage was on high ground upon which was located the owner's home, the court specifically finding that there was no public necessity for the taking of this 40 acres of land upon which she resided.

In accordance with the court's opinion, an order was entered denying the writ of prohibition as to the 42.1 acres of land but making such writ permanent as to the 40 acres upon which the owner resided. From this opinion the District appeals as to the 40 acre tract and the owner cross-appeals as to the 42.1 acre tract.

The minutes of the Board of Directors of the District proclaiming the necessity for the condemnation of appellee's land was made an exhibit to the application in the eminent domain suit and was set forth in the answer to the petition for a writ of prohibition, being as follows:

"WHEREAS, this Board does now find and determine that a substantial portion of the lands hereinafter described as Parcel No. 651 is required by the United

States of America, through its agency, the United States Park Service, for relocation of the Natchez Trace Parkway, necessitated by the construction of the Pearl River Reservoir, and that the remaining portion of said Parcel 651, all of which is located within the one-quarter mile from the outside line of the 300 foot above sea level contour on each side of Pearl River with other adjoining lands on the land side of the Natchez Trace Parkway, furnishes the only means of ingress and egress to and from the Reservoir in the approximate seven miles distance between Highway No. 43 and Greshams Bay; that said remaining portion of Parcel No. 651 will be connected with the main Reservoir by a boat passage structure under the Trace; that because of the location and needs of the Natchez Trace Parkway, suitable land available for access to the Reservoir in this area is very limited; that said portion of Parcel No. 651 is required to provide access facilities and accommodations for boating and fishing activities by the public, for use in connection with the harbor and marina development for the control of the Reservoir and the protection of its water from pollution and such other uses as are authorized by law as specified herein and to the extent applicable to these lands specified in said Resolution of this Board captioned 'General Policies of Land Acquisition'."

The lands here in controversy are located on the west side of the 30,000 acre reservoir approximately four miles south of the intersection of Highway 43 and the Natchez Trace Parkway and approximately six miles north of the reservoir dam to the south. The entire tract lies west of the present Natchez Trace Parkway and will lie west of the Parkway upon its being relocated. On the west side of the reservoir between the lake and the dam, there are only about 753 acres for public use in connection with

this reservoir. In the northern portion of the owner's property there is a creek which runs under the Natchez Trace. When the reservoir is flooded, this creek will become a cove or bay which the District plans to develop as a boat harbor with supporting facilities. This cove and boat harbor present the only place for access to the reservoir between Highway 43 and Gresham's Bay to the south, a distance of six or seven miles. The plans for the relocated Parkway provide for a bridge at this point with sufficient clearance to permit the passage of boats from the cove on the west side of the Parkway to the lake proper. The supporting facilities for the harbor will include picnic areas, trailer parks, space for tent camps and automobile parking spaces.

Due to scarcity of land on the east side of the Parkway, the District is seeking to acquire an additional 750 acres on the west or land side of the Parkway in the immediate vicinity of the four creeks or coves which pass under the Parkway. This 750 acres breaks down as follows: Beginning at the dam and proceeding north there are 162 acres in the vicinity of Walker Cove; 300 acres in the vicinity of Gresham's Cove; 270 acres in the vicinity of the Hazel Wood Cove, and north of Highway 43 in the vicinity of Williams Bay there is an additional 92 acres. These lands lie within one-quarter of a mile of the outside of the 300 foot contour line.

The owner sharply contends this one-quarter of a mile strip from the outside of the 300 foot contour line does not apply to the small creek or tributary which crosses the northern end of the property here in question, since this is a tributary of the river and not the river itself; and, this being true, it was not authorized by Sec. 5956-61 of the Miss. Code of 1942, Rec., nor was it the intent of the legislature in this Act to include tributaries. The

record reflects the present Natchez Trace Parkway is above the 300 foot contour line at this point, but that such line extends through and beyond a culvert under the Parkway.

The record discloses without doubt that the owner does reside upon the 40 acre tract to which the writ of prohibition was made permanent.

A county road presently intersects the southern extremity of the owner's property from the district's property to the south. Another county road extends from Highway 43 southward through the District's land to the north of the owner's property. The plans of the District are to extend the county road which lies to the south in a northerly direction, crossing the creek or bay, and on into the land owned by the District to the north, thence connecting with the entire existing county road system. The road system made possible by the acquisition of this land will roughly parallel the Parkway northward from the dam to Highway 43, and will provide access to the other reservoir properties from both north and south, as well as giving access to the coves between such highway and the dam, these coves, in turn, giving access by water to the lake proper.

Without the development of the cove on this land, the adjacent lands to the immediate north and south of the property here in litigation will afford no access to the lake by either automobile or boat, the District's ownership on the lake side of the Parkway in this area being limited to a ten-foot strip between contour 298 and the Natchez Trace Parkway. Such strip is available to the District only for maintenance and control of the shoreline and cannot be used in connection with the related facilities of the boat marina and harbor. For all practical

purposes, therefore, the western boundary of the reservoir at this location will be the Natchez Trace Parkway, over which the District has no control.

The projected statistics as to the usage, facilities needed, etc., are related in detail in the case of Pearl River Valley Water Supply District v. Brown, 156 So. 2d 572. They are applicable here and will not be repeated for brevity. The testimony further shows that final plans for use of these lands could not be made until the District determined with finality what lands it would have available to fit for the overall purposes of the reservoir.

The questions presented for the Courts to determine by the appeal and cross-appeal are: (1) Is the District required in proceedings for a writ of prohibition to prove that the land of a residential householder is absolutely necessary for the purposes of the reservoir project, and, (2) does the acquisition of land for access to the reservoir, control of the shoreline, pollution control of the reservoir waters, and the construction of recreational facilities such as boat harbors and supporting facilities, constitute uses which are public, and (3) is the District required to have definite and complete plans for roads and other developments which are to be placed on the land site?

The primary question presented on cross-appeal, the other questions raised thereby being so closely related to the former questions hereinabove set forth that there is no necessity to here outline them, is whether the trial court erred in allowing the appellant to put on testimony with reference to the 42.1 acre tract of the owner which was shown to be acquired by measuring outward from the 300 foot above sea level contour line which ran through the culvert under the Parkway and up the thread

of a small intermittent stream that flows into Pearl River, and was not, therefore, within a quarter of a mile of the 300 foot contour line of the river proper. In derogation it is charged of Sec. 17 of the Mississippi Constitution and the Fourteenth Amendment to the Constitutions of the United States.

The Court will address itself to the last question first, as it is apparent that if the District had no authority to take from the 300 foot contour line outward a distance of one-quarter of a mile from the creek or tributary, then the other questions would not come into being over a large portion of the 42.1 acre tract. The testimony of the engineers both for the owner and the District showed the 300 foot contour line to be correctly depicted upon the exhibits introduced. The testimony further shows that such line was correctly established beneath and beyond the Natchez Trace Parkway even though the same ran beneath and through this Parkway via a culvert. One of the engineers testified that this contour line is nothing more than a present location of the water line of the reservoir when it is filled to a level of 300 feet above sea. This water will, of course, seek its own level and in so doing will obviously flow through the culvert beneath the Natchez Trace Parkway and up the thread of the intermittent stream. This line will be smooth and symetrical only if the terrain is smooth and symetrical. It will be irregular and uneven if the terrain varies. The cross-appellant's contention that the line should be symetrical is not well taken for the obvious reason that a contour line is not subject to movement or variation according to the whim or desire of a landowner or engineer, but rather is an actual measurement of the distance between a particular place and sea level. It is, therefore, the Court's opinion that the contour line is properly

established along this tributary and that the District had the right to take outward therefrom a distance of one-quarter of a mile, and that such taking does not violence to Section 5956-61, or the legislative intent by so doing.

Section 5956-61(f), Miss. Code of 1942, Rec., is as follows: "To acquire by condemnation any and all property of any kind, real, personal or mixed, or any interest therein, within the project area not exceeding one-quarter mile from the outside line of the 300 foot above sea level contour on each side of Pearl River except as provided for rights of way under Subsection (g) of this section, within or without the boundaries of the District necessary for the project and the exercise of the powers, rights, privileges and functions conferred upon the District by this Act, according to the procedure provided by law for the condemnation of lands or other property taken for right of way or other purposes by railroads, telephone or telegraph companies. . . ."

The owner cites no case in law or argument in logic to the contrary.

The first question on direct appeal for our decision is whether the District is required in a proceeding for a writ of prohibition to prove the land of a residential householder is absolutely necessary for the purposes of the reservoir project before it can be condemned. Pearl River Valley Water Supply District v. Brown, supra, is directly in point here and decisive of this issue. It is therein stated clearly and without equivocation that the question of public use is always a judicial question and that public necessity for a taking is essentially a legislative question. The burden of proof is on the landowner who seeks to show lack of necessity, the rule being as to whether the taking is necessary is within the discretion of the con-

demnor and the courts will interfere with the exercise of such discretion only when abuse of discretion or fraud is shown. The record here, as there, is devoid of any proof or showing of any kind that the District abused its discretion in seeking to condemn the owner's land. No fraud, actual or legal, is shown or implied by cross-appellant. The trial court erred as a matter of law in requiring the appellant to show the land is absolutely necessary for the purposes of the project, it being the land of a resident householder.

This error apparently arose because the circuit judge erroneously applied the homestead provisions of the act as requiring public necessity to be shown clearly and without a doubt. See *District v. Brown*, supra, which the trial court did not have before it as it was not at that time decided. We hold, therefore, that the lower court erred in this regard.

The second question for decision on direct appeal is: Does the acquisition of land for (a) access to the reservoir, (b) control of the shoreline, (c) pollution control of the reservoir waters, and (d) the construction of recreational facilities such as boat harbors and supporting facilities constitute uses which are public?

Again this question has been decided under similar facts in *District v. Brown*, supra, wherein it is stated: "As far as appellee's land is concerned, there are three primary public uses, control of pollution, control of access to the reservoir, and to provide recreation. All of these uses pertain to the reservoir and to contend that these uses are not public is to contend that the reservoir itself is not a public use of the lands covered thereby."

Appellee and cross-appellant contends heartily that this does not apply here for the reason the Natchez Trace

Parkway lies between the lands herein sought to be condemned and the reservoir itself and that for this reason the question of pollution does not here come into being. Assuming, but not deciding, this to be true, there remain two primary public uses—control of access to the reservoir and provision for recreational facilities—which are so closely related to the reservoir in its entirety that this Court is constrained to hold in view of *Brown* that the uses herein question are public.

The third question for our decision on both appeals is whether the District is required to have definite and complete plans for roads and other developments which are to be placed thereon before eminent domain proceedings can be successfully instituted. Once again this is controlled by *Brown*, and is answered in the negative. The resolution is copied in another part of this opinion. It indicates the uses to be made of the owner's land, but neither the resolution nor the proof show any final plans specifically indicating what use is to be made of any particular part thereof. In accord with the cited case, we are of the opinion that appellee's argument is not well taken. The proof indicates that all of said land will be used for control of access to the reservoir and to provide public recreation. As heretofore stated, this alone is sufficient to meet the requirements of the law on the question of public use. In addition, the parking spaces, campsites, parks and other such facilities are also for public use. "It is unreasonable and unnecessary to require the condemnor for such public uses to include in the resolution and show by proof final plans for every part of the land taken. Such a rigid requirement would imply that no changes could ever be made in the various public uses as time and circumstances might require. It would also imply that no change in plans or use could ever be made

So long as public use is shown, detail plans are not required." *Brown*, supra.

We are of the opinion, and so hold, there exists no legal or factual basis for the issuance of a writ of prohibition in this case. On direct appeal, the case is reversed, the writ of prohibition is dissolved, and judgment is entered here dismissing the petition. The case is affirmed on cross-appeal.

REVERSED ON DIRECT APPEAL; WRIT OF PROHIBITION DISSOLVED; AFFIRMED ON CROSS-APPEAL.

KYLE, P.J., AND ETHRIDGE, GILLESPIE AND BRADY, JJ, CONCUR.